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No. 99-____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

FRED H. GOODSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the trial court's refusal to instruct the jury that materiality is a necessary element of mail fraud requires that the decision below be vacated and remanded for reconsideration in light of *Neder v. United States*, 119 S. Ct. 1827 (1999).

2. Whether an unissued license – or the government's right to control the issuance of a license – is the "property" of a government licensing authority, so that a person who is alleged to have used fraud to obtain a license can be said to have schemed to deprive the government of "property" within the meaning of the mail fraud statute, 18 U.S.C. § 1341.

LIST OF PARTIES

The parties to the proceeding below were:

Fred H. Goodson, Defendant-Appellant

Carl W. Cleveland, Defendant-Appellant

Maria F. Goodson, Defendant-Appellant

Larry S. Bankston, Defendant-Appellant

United States of America, Plaintiff-Appellee

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No. 99-____

IN THE
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FRED H. GOODSON,

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v.

UNITED STATES OF AMERICA,

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On Petition for a Writ of Certiorari
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for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Fred H. Goodson respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on July 21, 1999.

OPINIONS BELOW

The opinion of the District Court, holding that unissued video poker licenses are "property" under the mail fraud statute, is reported at 951 F. Supp. 1249 (E.D. La. 1997), and is reproduced at Pet. App. B, *infra*, 39a - 69a. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 182 F.3d 296 (5th Cir. 1999) and is reproduced at Pet. App. A,. 1a.- 38a. The order of the Fifth Circuit denying rehearing and rehearing en banc is unreported and is reproduced at Pet. App. C. *infra*, 70a –71a. The Order of the Fifth Circuit denying Mr. Goodson's motion for leave to file a supplemental brief addressing *Neder v. United States*, 119 S.Ct. 1827 (1999), is unreported, and is reproduced at Pet. App. D, *infra*, 72a - 73a.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued on July 21, 1999. Mr. Goodson's petition for rehearing and suggestion for rehearing en banc were denied by the Court of Appeals on September 2, 1999. This Court has jurisdiction under 28 U.S.C.§ 1254(1). *See* Supreme Court Rule 13.3.

STATUTORY PROVISIONS INVOLVED

1. The mail fraud statute, 18 U.S.C. § 1341, provides:

> **Frauds and swindles**
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations,

> or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

This petition, and the companion petition of Mr. Goodson's co-defendant and co-appellant, Carl W. Cleveland (No. 99-804), which Mr. Goodson adopts and incorporates herein, raise several important questions of federal criminal law. *First*, the jury in this case was not instructed that materiality is a required element of mail fraud, as this Court

ruled in *Neder v. United States*, 119 S. Ct. 1827 (1999), which was decided while Mr. Goodson's appeal was under consideration by the Fifth Circuit and was not considered by the Fifth Circuit. Particularly in light of the likelihood that the jury in this case may not have found any fraudulent statements by Mr. Goodson "material," the decision below must be vacated and remanded for reconsideration in light of *Neder*.

Second, the federal courts of appeals are in open disagreement as to whether an unissued license in the hands of the state is "property" within the meaning of this Court's decisions in *McNally v. United States*, 483 U.S. 350 (1987), and *Carpenter v. United States*, 484 U.S. 19 (1987), and, therefore, whether a fraudulent scheme to obtain such a license may be prosecuted under the mail fraud statute, 18 U.S.C. § 1341. The Fifth Circuit's affirmative answer to that question, while consistent with that of the First and Third Circuits, is contrary to that of the Second, Sixth, Seventh, Eighth, and Ninth Circuits. Thus, Mr. Goodson was convicted of mail fraud for conduct that would not be punishable in more than half the states in the country. The Court should grant certiorari in order to decide this question and restore uniformity to the law.

1. Factual Background

Petitioner Fred H. Goodson is a 60-year old resident of Pearl River, Louisiana, with no prior criminal involvement, who overcame underprivileged beginnings to become a successful businessman. He established several businesses, including truck stops, as well as other family businesses owned by his adult children, Maria (23 and a college student at the time of the events giving rise to the charges in this case) and Alex (then 28). In 1992, after the Louisiana legislature enacted a law permitting the operation of video

poker machines at certain business establishments, including truck stops, La. Rev. Stat. Ann. § 27:301 *et seq.*, Mr. Goodson and his family formed a limited partnership, Truck Stop Gaming, Ltd., ("TSG") in order to enter that business.

TSG was formed in 1992 as a Louisiana limited partnership *in commendam*. Alex and Maria Goodson each owned 49% of TSG as limited partners. The remaining 2% was owned by a separate corporation — which in turn was owned in equal shares by Alex and Maria — as general partner. TSG's Agreement of Partnership was signed by Alex and Maria, and filed with the Louisiana Secretary of State, as required by law.

Fred Goodson and the law firm of Cleveland, Barrios, Kingsdorf & Casteix ("CBK&C"), respectively, loaned Alex and Maria the start-up capital for TSG. Those loans were secured by promissory notes, payable on demand, with 10% interest. Fred Goodson was the General Manager of TSG.

a. **The Mail Fraud Charges**

As required by Louisiana law, TSG applied for and obtained licenses issued by the state, permitting TSG to operate video poker machines. The applications required TSG to identify its partners, and each partner was required to submit a personal financial statement, and to affirm that they were the sole beneficial owners, had no arrangement to hold their interest as "an agent, nominee or otherwise," and had no present intention to transfer any interest in the partnership at a future time. The applications disclosed the ownership structure described above. The government's mail fraud theory was that TSG's applications fraudulently failed to disclose that Fred Goodson and Carl Cleveland, a principal of CBK&C, owned TSG, and that Alex and Maria Goodson held interests in TSG by agreement as their "nominees."

The government claimed that the ownership interests of Fred Goodson and Carl Cleveland were concealed in order to avoid the scrutiny of their finances that would attend the "suitability investigation" conducted by the state licensing authority. However, it was undisputed at trial that the initial application disclosed that CBK&C and Fred Goodson had fully capitalized TSG, and that disclosure subjected them to a "suitability" investigation. It also was undisputed that TSG disclosed Fred Goodson's significant influence on the business, which disclosure also subjected him to a suitability investigation. Indeed, the evidence at trial showed that the Louisiana State Police *did* conduct a suitability investigation of Fred Goodson, and found him suitable.[1] Louisiana State Police Lt. Riley Blackwelder, who assisted in the creation of the Louisiana State Police Video Gaming Division, including the creation of the license applications at issue, testified for the government that he reviewed the applications and found no indication that Fred Goodson was trying to hide his interest in TSG.[2]

Given this evidence, it is apparent that any false statements made in the application with regard to the ownership of TSG were not material. However, at the time of trial, Fifth Circuit law held that materiality was not an element of mail fraud, and the District Court's instructions to the jury did not require a finding of materiality. *See Fifth*

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[1] In fact, a former Louisiana State Police lawyer described the disclosures regarding Mr. Goodson as "unusually specific," and the regulators clearly understood that Fred Goodson controlled TSG's operations.

[2] In addition, there was no evidence that Mr. Goodson had knowledge of any information concerning Mr. Cleveland's financial situation providing any reason to hide any interest of Mr. Cleveland in TSG.

Circuit Pattern Jury Instructions: Criminal, Instruction 2.60 (1997).

In addition, the "money or property" alleged to have been obtained by mail fraud consisted of unissued video poker licenses. Although a majority of the Circuits to consider the question have held that such licenses are not "property" for purposes of the mail fraud statute, the District Court here held that they are. Mr. Goodson and his co-appellants raised this issue on appeal to the Fifth Circuit, but that court held that it was bound by its previous decision in *United States v. Salvatore*, 110 F.3d 1131 (5th Cir.), *cert. denied sub nom, Tusa v. United States*, 522 U.S. 981 (1997), in which it agreed with the First and Third Circuits in holding that such licenses are "property" under the mail fraud statute.

b. The RICO Charges

The RICO charges against Mr. Goodson claimed a total of eight racketeering acts, including the mail fraud counts. Because the District Court denied defendants' request for a verdict specifying the predicate acts relied upon for any RICO conviction, it is impossible to determine whether the RICO convictions were based on the mail fraud racketeering acts. Therefore, if the mail fraud charges are flawed, the RICO charges must fail as well. *United States v. Marcello*, 876 F.2d 1147 (5th Cir. 1989).

c. The Money Laundering Charges

The indictment charged Mr. Goodson with money laundering – both as RICO predicate acts and as substantive counts – for transactions in which he deposited to his bank account payments made by TSG for management services and, after taxes were paid, loaned funds back to TSG. The money laundering charges were premised on the mail fraud

charges, since the government asserted that the supposedly laundered funds were the "proceeds" of the mail fraud scheme. *See* 18 U.S.C. § 1956(a)(1). Mr. Goodson was convicted of five counts of money laundering.

d. Sentencing and Forfeiture

As a result of his conviction for money laundering, Mr. Goodson received an extraordinarily harsh sentence, including ten years and one month imprisonment. Absent the mail fraud and money laundering charges, any term of imprisonment applicable to Mr. Goodson under the Sentencing Guidelines would have been years shorter. Nevertheless, although Mr. Goodson's alleged money laundering involved no effort to disguise the source of funds or other activity fitting within the "heartland" of the crime, the District Court rejected a request for a downward departure. *See* U.S.S.C., *Sentencing Policy for Money Laundering Offenses 5* (Sept. 18, 1997) ("money laundering sentences are being imposed for . . . conduct that is substantially less serious than the conduct contemplated when the money laundering guidelines were first formulated").

The District Court also found Mr. Goodson liable to forfeit his interests in several businesses, as well as millions of dollars representing proceeds received by TSG between July 1994 and August 1995 – even though Mr. Goodson never owned any part of TSG, or had any ownership interest in its proceeds.

2. The Fifth Circuit's Opinion

On June 10, 1999, three months after Mr. Goodson's appeal was argued to the Fifth Circuit, this Court ruled, contrary to prior Fifth Circuit law, that materiality is an element of mail fraud. *Neder v. United States*, 119 S. Ct.

1827 (1999). The Fifth Circuit denied the motion of Mr. Goodson and his co-appellant Carl Cleveland for leave to file a supplemental brief addressing *Neder*, and eight days later issued its opinion, which does not address *Neder* or materiality.[3] Relying on its earlier decision in *Salvatore*, *supra*, the Fifth Circuit ruled that the Louisiana video poker licenses at issue were "property" under the mail fraud statute, 18 U.S.C. § 1341.[4]

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[3] Mr. Goodson also raised the *Neder* issue in his suggestion for rehearing en banc, but it was denied without comment.

[4] In *Salvatore*, the court acknowledged that the Second, Sixth, Seventh, Eighth, and Ninth Circuits had held that "state-issued licenses are not property for the purposes of the mail fraud statute," 110 F.3d at 1139 (citing *United States v. Schwartz*, 924 F.2d 410, 417-18 (2d Cir. 1991); *United States v. Murphy*, 836 F.2d 248, 254 (6th Cir. (1988)); *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989); *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990), *United States v. Kato*, 878 F.2d 267, 268-69 (9th Cir. 1989); *United States v. Dadanian*, 856 F.2d 1391 (9th Cir. 1988)), but agreed with the First and Third Circuits in holding that "licenses constitute money or property for the purposes of the mail fraud statute." 110 F.3d at 1143 (citing *United States v. Bucuvalas*, 970 F.2d 937, 945 (1st Cir. 1992); *United States v. Martinez*, 905 F.2d 709, 715 (3d Cir. (1990)).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW SHOULD BE REMANDED FOR RECONSIDERATION IN LIGHT OF THIS COURT'S HOLDING IN *NEDER v. UNITED STATES*[5]

As described above, the prosecution's mail fraud theory was that TSG's license applications failed to disclose that Fred Goodson and Carl Cleveland owned TSG, in order to avoid the scrutiny of their finances that would attend the "suitability investigation" conducted by the state licensing authority. However, it was undisputed at trial that disclosures in the application subjected Messrs. Goodson and Cleveland to a "suitability" investigation, that the Louisiana State Police *did* conduct a suitability investigation of Mr. Goodson, and that he was found suitable. In addition, a former attorney for the Louisiana State Police Gaming Division testified that the forms containing the allegedly fraudulent statements were a "mere formality," and generally not considered by the State Police, and that the State Police were concerned primarily with current ownership, rather than any agreements to transfer ownership in the future.

Particularly in light of the fact that the jury deliberated for seven days, and acquitted Mr. Goodson on several counts, including several counts of mail fraud, it is readily apparent that, had the jury been properly instructed as to the materiality requirement, it may well have returned verdicts of acquittal. Mr. Goodson is entitled to the benefit of the

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[5] Mr. Goodson adopts and incorporates the argument on this issue stated in the petition for certiorari filed by his co-defendant and co-appellant, Carl W. Cleveland.

change in substantive law resulting from *Neder*. *E.g.*, *Hamling v. United States*, 418 U.S. 87, 102 (1974) (changes in substantive law apply to criminal cases pending on direct appeal). The Court should grant certiorari, vacate the decision below, and remand for reconsideration in light of *Neder*. *E.g.*, *Stutson v. United States*, 516 U.S. 193, 197-98 (1996).

II.

THERE IS A SQUARE CONFLICT AMONG THE CIRCUITS ON THE "LICENSE AS PROPERTY" ISSUE UNDER THE MAIL FRAUD STATUTE

The Fifth Circuit's opinion correctly recognizes that a scheme to obtain a license from a government authority through deception can support a prosecution under the federal mail or wire fraud statutes only if, in obtaining the license, the defendant deprived the government of "property." As the Fifth Circuit forthrightly acknowledges, its holding that an unissued license in the hands of the government is property, though consistent with rulings of the First and Third Circuits, is contrary to decisions of the Second, Sixth, Seventh, Eighth, and Ninth Circuits. Mr. Goodson adopts and incorporates the argument on this issue stated in the petition for certiorari filed by his co-defendant and co-appellant, Carl W. Cleveland.

CONCLUSION

In sum, Mr. Goodson's mail fraud convictions – which served as the foundation for his RICO and money laundering convictions – resulted in an extraordinarily harsh punishment. Mr. Goodson has already served two years in prison, but still must serve eight more. In addition, he has been ordered to forfeit millions of dollars.

Mr. Goodson was convicted of mail fraud by a jury that was not instructed that, as this Court has since held, materiality is an element of mail fraud. This failure directly contravenes Mr. Goodson's Fifth and Sixth Amendment right not to be convicted absent a determination by the jury that all elements of the crime have been proved beyond a reasonable doubt. *E.g.*, *United States v. Gaudin*, 515 U.S. 506, 509-10 (1995). For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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December 1, 1999

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 97-31057, 98-30471

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross-Appellant,

v.

LARRY S. BANKSTON;
MARIA F. GOODSON,
Defendants-Appellants-Cross-Appellees,

CARL W. CLEVELAND; FRED H. GOODSON,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARIA F. GOODSON,
Defendant-Appellant.

ALEXANDROS F. GOODSON; TRUCK
STOP GAMING LTD.,
Intervenors -Appellants.

July 21, 1999

Appeals from the United States District Court
for the Eastern District of Louisiana

Before KING, Chief Judge, and REAVLEY and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge.

Larry Bankston ("Bankston"), Fred Goodson, Maria Goodson, and Carl Cleveland ("Cleveland") appeal from their June 27, 1997, convictions and October 15, 1997, sentences for various offenses related to criminal activity in the Louisiana video poker industry. Fred Goodson and Cleveland, along with Alex Goodson, Maria Goodson, and Truck Stop Gaming, Inc. ("TSG, Inc."), additionally appeal the, district court's judgment of forfeiture of Truck Stop Gaming, Ltd. ("TSG, Ltd.") and TSG, Inc. as part of the RICO enterprise. The Government cross-appeals, challenging the district court's calculation of both Bankston's and Maria Goodson's sentences. For the reasons set forth below, we affirm the Appellants' convictions and sentences and the forfeiture of TSG, Ltd. and TSG, Inc.

I. BACKGROUND

Fred Goodson and his family had been in the truck stop business in Slidell, Louisiana for 20 years. In early 1992, the Goodson family formed TSG, Ltd. and its corporate partner, TSG, Inc., in order to participate in the video poker business at their Slidell truck stop. Fred Goodson and Carl Cleveland's law firm, Cleveland, Barrios, Kingsdorf & Casteix ("CBK&C"), loaned Goodson's adult children, Alex and Maria, the start-up capital for TSG, Ltd.[1] With the legal assistance of CBK&C, a partnership in commendam was established. Alex and Maria each owned 49% of TSG, Ltd. as limited partners.[2] TSG, Inc.

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[1] Those loans were secured by promissory notes, payable on demand, with 10% annual interest

[2] TSG, Ltd.'s Agreement of Partnership was signed by Alex and Maria and filed with the Louisiana Secretary of State.

owned the remaining 2% as general partner.[3] Fred Goodson managed TSG, Ltd. CBK&C also helped the Goodsons prepare and submit to the Louisiana State Police applications for an owner/operator's gaming license for TSG, Ltd. The gaming applications required partnerships seeking a license to identify their partners, to submit personal financial statements for all partners, and to affirm that the listed partners, were the sole beneficial owners, that no partner had an arrangement to hold his interest as "an agent, nominee or otherwise," or a present intention to transfer any interest in the partnership at a future time. The initial application submitted on behalf of TSG, Ltd. identified Maria and Alex Goodson as the limited partners and TSG, Inc. as the general partner. The application listed no other persons or entities as having any ownership interest in TSG, Ltd. The initial license application did disclose, however, that Fred Goodson and CBK&C had loaned Maria and Alex all initial capital. That same application also identified Fred Goodson as general manager of the business. TSG, Ltd. submitted renewal applications in 1993, 1994, and 1995, which also listed no additional ownership interests.[4]

In 1994, as a part of an unrelated federal investigation of alleged corruption involving Louisiana legislators, the F.B.I. obtained court authorization to conduct electronic surveillance of the office of Louisiana State Senator Larry Bankston. The authorization was based on a series of consensually recorded conversations that took place in September and October 1994 between Bankston and Robert Miller, a cooperating witness.

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[3] Alex and Maria owned equal shares of TSG, Inc.

[4] In August 1994, Maria Goodson executed a "Sale of Partnership Interest and Pledge Agreement," which conveyed to Benny Rayburn, the adult son of co-defendant Benjamin "Sixty" Rayburn, a 4.99% interest in TSG, Ltd. Rayburn's 4.99% interest was not disclosed in any renewal application.

According to the FBI, the Bankston-Miller conversations indicated that Bankston was engaged in a scheme to extort an interest in a casino proposed by the Jena Choctaw tribe, in exchange for his influence in ensuring government approval of the casino.

During the course of its electronic surveillance--limited to the interception of communications concerning the alleged Jena Choctaw scheme--the FBI recorded a conversation between Bankston and Fred Goodson. In that conversation, the two men discussed, in detail, Goodson's truck stop business. Neither man mentioned the Jena Choctaw scheme. Approximately 20 minutes into their discussion, Goodson broached the subject that would form the basis for the present multi-party, multi-count indictment. Armed with the recording of Bankston and Goodson's 44-minute conversation, the FBI obtained court authorization for electronic surveillance on Goodson's home and businesses.

On October 4, 1996, the Government charged now former Louisiana State Senators Benjamin "Sixty" Rayburn and Larry Bankston; video poker entrepreneur Fred Goodson; his daughter, Maria Goodson; family attorney, Carl Cleveland; and the family's accountant, Joe Morgan, with a combination of racketeering, racketeering conspiracy, mail fraud, conducting an illegal gambling business, money laundering, tax conspiracy, false declaration under penalty of perjury, aiding and abetting a false declaration under penalty of perjury, and interstate communications in aid of racketeering.[5] Most of the charges against the Goodsons, Cleveland, and Joe Morgan related to the establishment, licensing, and operation of TSG,

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[5] The Government did not indict Fred Goodson's son, Alex Goodson, but subsequently named him an unindicted co-conspirator. Alex Goodson joins the instant action as an intervenor in the forfeiture proceedings.

Ltd. The Government alleged that the defendants had schemed to defraud state regulators in obtaining video poker licenses for TSG, Ltd., and to obtain favorable legislation affecting Louisiana's video poker industry. Specifically, the Government alleged that the defendants obtained a gaming license for TSG, Ltd. in 1992 and renewed in 1993, 1994, and 1995, by fraudulently concealing the identity of the true owners of the company, Fred Goodson and Carl Cleveland.[6] According to the Government, Goodson and Cleveland concealed their ownership in order to avoid the probing inquiry of the State's suitability assessment.

Trial commenced on May 12, 1997, and lasted six weeks. Following more than seven days of deliberation, the jury returned a mixed verdict, finding four of the defendants--Carl Cleveland, Fred Goodson, Maria Goodson, and Larry Bankston--guilty of certain counts.[7] The jury acquitted the remaining two defendants--Senator Rayburn and Joe Morgan--on all counts.

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[6] "Alex and Maria Goodson were from inception and remain the record owners of TSG, Ltd. and its corporate general partner, TSG, Inc.

[7] Cleveland was convicted on one count of RICO, one count of RICO conspiracy, two counts of mail fraud (in connection with the 1994 and 1995 TSG, Ltd. gaming license renewal applications), four counts of money laundering, one count of tax conspiracy, and one count of aiding and abetting the filing of a false tax return. Like Cleveland, Fred Goodson was convicted of one count of RICO, one count of RICO conspiracy, and two counts of mail fraud (in connection with the 1994 and 1995 TSG, Ltd. gaming license renewal applications). The jury additionally convicted Goodson of five counts of money laundering and three counts of the use of interstate communications in aid of state bribery. His daughter, Maria, was found guilty of one count of mail fraud in connection with TSG, Ltd.'s 1995 license renewal application. Former Senator Bankston was found guilty of two counts of committing and/or aiding and abetting interstate communications in aid of racketeering.

On October 15, 1997, The district court sentenced the four convicted defendants. Both Cleveland and Fred Goodson received terms of imprisonment of 121 months. Maria Goodson received a six-month term of imprisonment to be followed by six months of home detention. Bankston received a 41-month term of imprisonment and a fine of $20,000.

The defendants filed timely notices of appeal as to their convictions and sentences. On November 14, 1997, the Government filed a notice of cross-appeal relating to the sentences of Bankston and Maria Goodson.

Following Fred Goodson's and Carl Cleveland's convictions for RICO and RICO conspiracy, the Government sought forfeiture of, inter alia, their alleged interests in TSG, Ltd. and TSG, Inc. On August 26, 1997. the district court entered a judgment ordering the forfeiture of TSG, Ltd. and TSG, Inc. The district court noted that the jury's verdict and the evidence in the criminal trial record proved beyond a reasonable doubt that Goodson and Cleveland had an interest in TSG, Ltd. and TSG, Inc. and that those entities were part of the RICO enterprise. On October 21, 1997, The district court entered the final order of forfeiture.

On October 31, 1997, Alex and Maria Goodson, as record owners of TSG, Ltd. and TSG, Inc., filed separate petitions of intervention in the forfeiture proceedings, asserting their ownership interests in the two companies. On February 4, 1998, the district court conducted an evidentiary hearing on their petitions, and on April 15, 1998, the district court denied their claims. The district court ruled that Fred Goodson and Carl Cleveland were the "true owners" of TSG, Ltd. and TSG, Inc. and that their ownership interests had been properly forfeited to the Government. Alex and Maria Goodson and TSG, Inc. appeal from that ruling.

II. DISCUSSION

A. Wiretap Evidence

1. Application Omissions

Fred Goodson and Larry Bankston argue that the district court erred in refusing to suppress the evidence obtained from the Bankston wiretap. Both appellants additionally argue that the district court erred in denying their request for an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Before trial, Bankston filed a motion to suppress the wiretap evidence. Fred Goodson, Maria Goodson, and Carl Cleveland joined the motion.[8] Bankston contended that the November 25, 1994, affidavit completed by Agent Jones in support of the wiretap application contained fatal omissions and misrepresentations. His motion described an "exculpatory" conversation between Bankston and Miller that had been omitted from the wiretap application and claimed that the FBI told Miller to stop recording after that conversation. Bankston asserted that the false statements and/or omissions were deliberately or recklessly made. He accompanied his motion with an offer of proof including affidavits and sworn testimony.

The district court, after hearing arguments by counsel and reviewing submissions, denied Bankston's request for a *Franks* evidentiary hearing. The court found that Bankston had failed to make the requisite showing that the affiant, Agent Jones, had

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[8] On appeal, Maria Goodson and Carl Cleveland cross-incorporate Fred Goodson and Bankston's suppression arguments. However, neither Maria nor Cleveland meets our standing requirements as articulated in *United States v. Scasino*, 513 F.2d 47 (5th Cir. 1975). Because we conclude that the district court did not err in admitting the wiretap evidence, we need not consider Cleveland's argument that he has standing despite Scasino.

intentionally misled the District Court and tricked the Court into issuing the wiretap authorization and that the omissions were material such that they negated probable cause.

We review de novo the denial of a *Franks v. Delaware* evidentiary hearing. *See United States v. Dickey*, 102 F.3d 157, 162 (5th Cir. 1996) (reviewing the denial of a *Franks* hearing in the context of a search warrant); *United States v. Guerra-Marez*, 928 F.2d 665, 671 (5th Cir. 1991) (applying the Franks standard and reviewing de novo the decision of the district court to validate a wiretap order). In *Franks v. Delaware*, the Supreme Court held that a defendant is entitled to an evidentiary hearing to contest the validity of a search warrant if he makes a substantial preliminary showing that (1) allegations in a supporting affidavit were a deliberate falsehood or made with a reckless disregard for the truth and (2) the remaining portion of the affidavitis not sufficient to support a finding of probable cause. *See Franks*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684, 57 L. Ed. 2d 667 (1978). We have explained that "even if the defendant makes a showing of deliberate falsity or reckless disregard for the truth by law enforcement officers, he is not entitled to a hearing if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause." *United States v. Privette*, 947 F.2d 1259, 1261 (5th Cir. 1991) (quoting *Franks*, 438 U.S. at 171-72, 98 S. Ct. at 2684-85)).

We have applied *Franks* to instances of omission where, as here, an affidavit falls squarely within the dictates of 18 U.S.C. § 2518. *United States v. Tomblin*, 46 F.3d 1369, 1377 (5th Cir. 1995) (noting that "omissions or misrepresentations can constitute improper government behavior"). In such cases of omitted information, the logic of *Privette* holds firm: a defendant is not entitled to an evidentiary hearing if a wiretap

authorization would lawfully have issued after correcting the supporting affidavit by supplying any material omissions. Therefore, in determining whether Fred Goodson and Bankston were improperly denied an evidentiary hearing on their motion to suppress, we need only consider Agent Jones's affidavit--corrected to contain the allegedly exculpatory conversation--and determine whether that reconstructed affidavit satisfies the wiretap requirements contained in 18 U.S.C. § 2518.

If the Jones affidavit were revised to include the omitted information, the affidavit would describe conversations suggesting that between September 19 and October 31, 1994, the cooperating witness, Miller, and Bankston had discussed a scheme to exchange Bankston's influence for an ownership interest in the Jena Choctaw casino. In particular, the affidavit would reveal that Bankston had met with Jena Choctaw Chief Jackson several times, had agreed to provide the Jena Choctaw tribe with "political cover," and had been telephoned frequently by Chief Jackson. The affidavit would also state that, in a sixth conversation with Miller on October 31, 1994, Bankston had declared that he was "fini" and that his present intention was "to stay away from . . . this entire thing." The affidavit would additionally include statements made by Bankston to Miller at the conclusion of that October 31, 1994, conversation expressing Bankston's "willing[ness] to proceed" with the project if "something could be worked out to his satisfaction."

a. Probable Cause

An application for a wiretap must demonstrate probable cause to believe that the target has committed, is committing, or will commit a crime, as well as "probable cause for belief that particular communications concerning that offense will be obtained through such interception." 18 U.S.C. § 2518(3)(a)-(b). We evaluate probable cause utilizing a totality-of-the-circumstances test. *See Dickey*, 102 F.3d at 162. In light of

Miller's multiple statements to the FBI that Bankston was negotiating a deal in which he would extort an undisclosed interest in the Jena Choctaw casino, the multiple taped conversations containing statements that corroborated this tip from Miller, and the ambiguity of any exculpatory statements in the October 31 conversation, we find that the reconstructed affidavit would establish sufficient probable cause to authorize electronic surveillance on November 25.[9]

b. Necessity

Bankston and Goodson also argue that the application failed to meet the dictates of 18 U.S.C. § 2518(3)(c), which requires the Government to show and the issuing judge to find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(3)(c). The Government "need not prove exhaustion of every conceivable option before a wiretap order may issue." *Guerra-Marez,* 928 F.2d at 671.

Here, the FBI included included in its 21-page wiretap application a detailed account of the investigative techniques it had employed in making its case against Bankston. Agent Jones stated in his November 25, 1994, affidavit that the use of electronic surveillance was necessary because Bankston had

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[9] Our finding of probable cause includes a finding that "particular communications" concerning that offense would have been "obtained through such interception." *See 18 U.S.C. § 2518*(3)(b). The October 31, 1994, conversation between Miller and Bankston in no way undermines probable cause to believe that Bankston would have committed the Jena Choctaw scheme and that particular communications concerning the scheme would occur either in Bankston's office or on his phone.

made it clear to Miller that he would not include him in any potentially incriminating conversations with third parties.[10]

We have affirmed wiretap orders based upon similar affidavits. *See, e.g., United States v. Krout*, 66 F.3d 1420, 1425 (5th Cir. 1995) (explaining that the informants or undercover agents could not infiltrate the conspiracy at high enough levels); *United States v. Collins*, 972 F.2d 1385, 1412 (5th Cir. 1992) (noting that consensual monitoring would be impossible, as it was unlikely that the informant would be present during the illegal activity). Agent Jones's affidavit provides sufficient information to meet the requirements of § 2518(3)(c). The omission of the October 31 conversation does not impact our finding of "necessity," nor does the fact that the FBI failed to inform the issuing court that Miller had been told to cease recording his conversations with Bankston. Regardless of whether Miller continued to record his conversations with Bankston, Miller was unlikely to be present during the talks between Bankston and his Louisiana contacts. Therefore, a need for electronic surveillance existed.

2. Minimization

Bankston and Fred Goodson contest the district court's factual finding that the FBI properly minimized the interception of communications outside the scope of the wiretap order. In particular, Bankston and Goodson dispute the interception of their December 1994 conversation, which included no mention of the Jena Choctaw tribe casino scheme and did not broach the subject of criminal activity until approximately twenty minutes into the conversation. We review determinations of the

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[10] In his talks with Miller, Bankston had alluded to conversations that he would be having with his stockholder nominee as well as other people in Louisiana whom he had to satisfy out of his five-percent hidden ownership interest in the Jena Choctaw casino.

reasonableness of minimization efforts for clear error. *See United States v. Wilson*, 77 F.3d 105, 112 (5th Cir. 1996).

Section 2518 implements "the constitutional mandate . . . that wiretapping must be conducted with particularity," *United States v. Daly*, 535 F.2d 434, 440 (8th Cir. 1976) (citation omitted), by requiring electronic surveillance to "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." 18 U.S.C. § 2518(5). The Government's efforts to minimize nonrelevant conversations must be "objectively reasonable" in light of the circumstances confronting the interceptor. *Scott v. United States*, 436 U.S. 128, 136-143, 98 S. Ct. 1717, 1723-27, 56 L. Ed. 2d 168 (1978); *see also United States v. Hyde*, 574 F.2d 856, 869 (5th Cir. 1978) (explaining that the minimization standard applies a test of reasonableness to the particular facts of each case) (citing *Daly*, 535 F.2d at 441). Neither the Fourth Amendment nor 18 U.S.C. § 2515, however, requires government agents to avoid intercepting all nonrelevant conversations when conducting a wiretap investigation. *See Scott*, 436 U.S. at 137-140, 98 S. Ct. 1723-24.

We consider three factors in deciding the objective reasonableness of efforts to minimize: (1) the "nature and scope of the criminal enterprise under investigation;" (2) the "Government's reasonable inferences of the character of a conversation from the parties to it;" and (3) the "extent of judicial supervision." *Hyde*, 574 F.2d at 869. Here, consistent with our precedent, the district court found that the FBI's efforts to minimize were reasonable in light of the fact that (1) the criminal investigation involved "a potentially wide-ranging conspiracy in which the coconspirators had not been identified;" (2) Goodson reported to Bankston "specific details of Goodson's truck stop business that one would not normally provide to one who was not a participant in the endeavor;" and

(3) the issuing court had determined, based on regularly submitted ten-day reports, including the results of interceptions, that the Government was acting in a proper manner.

Bankston reurges statistical analyses he presented to the district court to question the Government's minimization efforts. Bankston's reliance on statistics is unpersuasive. First, the district court rightly pointed out that Bankston's statistics, even if taken as accurate, showed minimization efforts that were reasonable. Second, the Supreme Court has discouraged the use of statistics, explaining that "blind reliance on the percentage of nonpertinent calls intercepted is not a sure guide to the correct answer." *Scott,* 436 U.S. at 140, 98 S. Ct. at 1724.

Goodson argues that the criminal nature of the December 1994 conversation could not have been immediately apparent because the subject of criminal activity was not broached until approximately twenty minutes into the conversation and that, by this point, agents should have already ceased monitoring the conversation. Goodson analogizes an agent's monitoring of communications concerning crimes not the subject of a wiretap order to an officer's seizure of contraband pursuant to the plain view doctrine. Goodson cites *United States v. Johnson*, 176 U.S. App. D.C. 179, 539 F.2d 181 (D.C. Cir. 1976), in support of his novel plain view analogy. In particular, Goodson points to the following language from Johnson: "Like an officer who sees contraband in plain view from a vantage point where he has a right to be, one properly overhearing unexpected villainy need not ignore such evidence." *See id.* at 188. Goodson then attempts to graft onto the *Scott* objective reasonableness inquiry the plain view doctrine's probable cause requirement. He urges us to find that an agent monitoring "windfall" communications must, at the time of the monitoring, have probable cause to believe that the communication concerns criminal activity.

Caselaw does not support such a probable cause requirement. We are unaware of any case in which an appellate court employed a probable cause analysis to determine whether to suppress non-minimized, "other criminal activity" communications. Moreover, requiring probable cause that a windfall communication itself concerns criminal activity is inconsistent with the objective reasonableness inquiry. Adding a probable cause analysis would require that monitoring agents be more than reasonable in their efforts to minimize. Goodson's approach would require that agents be gifted with "prescience" and the ability to "'know in advance what direction the conversation will take.'" *United States v. Cox*, 462 F.2d 1293, 1301 (8th Cir. 1972) (quoting *United States v. LaGorga*, 336 F. Supp. 190, 196 (W.D. Penn. 1971)). Consistent with *Scott*, we conclude that the district court did not commit clear error in determining that the FBI's minimization efforts were objectively reasonable.

B. Choice of Counsel

Fred Goodson argues that the district court erred in denying, on grounds of conflict, his motion to associate Michael Fawer as additional counsel.[11] Goodson complains that the district court's ruling constitutes error in light of both his and Rayburn's knowing waiver of any conflict of interest

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[11] Michael Fawer represented Goodson's co-defendant, former Louisiana State Senator Rayburn, through the investigative stage of this case. Fawer assisted Rayburn in responding to three grand jury subpoenas, had discussions with the Government regarding the nature of the charges being considered against Rayburn, and appeared in court on behalf of Rayburn at the initial appearance, as well as later to argue motions.

On November 5, 1996, Fawer withdrew as counsel for Rayburn, and Arthur A. Lemann, III replaced Fawer as counsel for Raybum. On February 24, 1997, Goodson moved the district court to associate Fawer as additional counsel for him.

and the sworn statements averring unawareness of any actual or potential conflict of interest submitted by Michele Fournet (counsel for Goodson), Michael Fawer, and Arthur Lemann.

We review a district court's finding of a conflict of interest for abuse of discretion. *See United States v. Sotelo*, 97 F.3d 782, 791 (5th Cir. 1996). Although a district court must "recognize a presumption in favor of petitioner's counsel of choice," "that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Wheat v. United States*, 486 U.S. 153, 164, 108 S. Ct. 1692, 1700, 100 L. Ed. 2d 140 (1988). This is true even where a defendant expresses a desire to waive the potential conflict. *See Sotelo*, 97 F.3d at 791.

The crux of Goodson's argument is that the district court's veto of his choice of counsel without finding any "special circumstances" beyond the fact of multiple representation amounts to a per se rule that multiple representation would never be permissible. Goodson contends that such a per se rule contravenes Supreme Court and Fifth Circuit precedent that has recognized the advantages of common defenses. Goodson additionally argues that the four potential areas of conflict elucidated by the district court exist in every case of multiple representation and that appellate courts have regularly found that conflicts do not arise in those contexts.[12]

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[12] The district court outlined four areas of potential conflict: (1) because a plea by Goodson would be adverse to Rayburn's interests, Fawer would have a conflict in advising Goodson regarding plea negotiations; (2) evidence could develop at trial that pitted one defendant's interest against the other's; (3) Goodson's and Rayburn's interests could diverge at sentencing, over issues such as their respective roles in the offense; and (4) because Fawer received confidences from Rayburn, Fawer's cross-examination of Rayburn would be problematic.

Goodson's argument is flawed. First, the district court in no way established a per se rule against joint representation. The district court applied the Sixth Amendment and the Supreme Court's Wheat analysis to the facts developed at the hearing before the magistrate judge. On the basis of those facts, The district court concluded that institutional interests and interests of the defendant warranted a denial of Goodson's motion to associate Fawer. Second, neither the Supreme Court nor this Circuit has adopted a "special circumstances" test for determinations of conflict in joint representation. Although the Supreme Court's 1980 *Cuyler* decision does include "special circumstances" language, it does so only in discussing when a state court, sua sponte, needs to "initiate inquiries into the propriety of multiple representation." *Cuyler v. Sullivan*, 446 U.S. 335, 346, 100 S. Ct. 1708, 1717, 64 L. Ed. 2d 333 (1980). Third, the cases upon which Goodson relies to show that joint representation is permissible despite possible conflicts of interest involve claims of ineffective assistance of counsel. In those cases, the courts employed a retrospective, record-based inquiry in order to determine whether an attorney was operating under a conflict of interest. Their findings of "no conflict" are of limited usefulness here, where the district court predicated its denial of the motion to associate counsel on a finding of serious potential conflict. Goodson fails to appreciate the distinction between a retrospective inquiry of actual conflict and a prospective inquiry into serious potential conflict.

The evaluation of the facts and circumstances of each case under the Wheat standard "must be left primarily to the informed judgment of the trial court." *Wheat*, 486 U.S. at 164, 108 S. Ct. at 1700. The district court made specific findings as to four potential areas of serious conflict. We find that the district court did not abuse its discretion in denying Goodson's motion to associate Fawer.

C. Louisiana Video Poker License as "Property"

Maria Goodson and Attorney Cleveland assert that a Louisiana video poker license is not "property" for purposes of the mail fraud statute, 18 U.S.C. § 1341. Less than two years ago, we reached a contrary conclusion in *United States v. Salvatore*, 110 F.3d 1131 (5th Cir. 1997). Bound by our prior decision, we do not revisit this issue.

D. Fair Notice

Maria Goodson and Cleveland argue that, at the time of their mail fraud offenses, they did not have fair notice that the acts charged were crimes. They claim that they did not have notice (1) that unissued video poker licenses constituted property under the mail fraud statute, and (2) that certain information needed to be reported to the Louisiana State Police on the video poker license applications. We find these arguments devoid of merit.

"The test of whether a statute is unconstitutionally vague so as to deprive fair notice is whether it provides a person of ordinary intelligence a reasonable opportunity to know what is proscribed." *United States v. Brewer*, 835 F.2d 550, 553 (5th Cir. 1987). With regard to the first claim, we note that, at the time of the charged conduct, a circuit split existed as to whether or not unissued licenses constituted property for purposes of the mail fraud statute. Although we had not yet ruled on the issue, at least two circuits had found that unissued licenses are property for mail fraud purposes. Accordingly, we conclude that, assuming each to be of ordinary intelligence, Maria Goodson and Cleveland had reasonable opportunity to know that their conduct could be proscribed by the mail fraud statute. *Cf. United States v. Brumley*, 116 F.3d 728, 732 (5th Cir. 1997) (en banc) ("Constructions of a statute announced by the Supreme Court or lower courts can give citizens fair warning,

even if the cases are not fundamentally similar." (quotation marks omitted)).

We are equally unpersuaded by Maria Goodson and Cleveland's claim that they did not have fair notice that the Louisiana State Police required disclosure of indefinite and contingent plans to acquire an equity interest in a video poker licensee at some unspecified time in the future, or an ownership or other interest in a licensee of less than five percent. The "Affidavit of Full Disclosure" that accompanied the initial and renewal applications explicitly required that video poker applicants be the "sole beneficial owner of any direct or indirect interest in or to a licensed gaming operation . . . except such as having been reported in writing to the Louisiana State Police." The affidavit required that applicants attest that they had (1) "no agreements or understandings with any other person and no present intent to hold as agent, nominee, associate, third party or otherwise any direct or indirect interest whatsoever in or to the licensed gaming operation" and (2) "no agreements or understandings with any other person and no present intent to transfer at any future time any interest whatsoever . . . ." We find that this language provided a person of ordinary intelligence adequate notice that ownership interests in any amount must be disclosed to the Louisiana State Police. Similarly, we find the "agreement or understanding" language sufficiently broad to include indefinite and contingent plans to acquire equity interests at some unspecified future time. We therefore conclude that Maria Goodson and Cleveland had fair notice.

E. State Law "Ownership" Jury Instructions

Cleveland, Fred Goodson, and Maria Goodson claim that the district court erred in refusing to charge the jury concerning certain state-law concepts of ownership. The district court refused to give the requested instructions because, inter alia, the

state-law concepts did "not go to the guilt or innocence of the defendants." We review a district court's refusal to provide a requested instruction for abuse of discretion. *See United States v. Pennington*, 20 F.3d 593, 599 (5th Cir. 1994). Although we have recognized the importance of instructing on legal concepts significant to a theory of defense, *see, e.g., United States v. Cavin*, 39 F.3d 1299, 1310 (5th Cir. 1994) (reversing a conviction because the court failed to instruct on state ethical rules relevant to an attorney's theory of defense), we have never required that a district court instruct a jury on peripheral concepts that do not directly implicate an essential element of the charged offense.

Cleveland argues that the ownership instructions were directly relevant to both his guilt or innocence and that of Fred and Maria Goodson. According to Cleveland, the critical issue to be decided by the jury was whether TSG, Ltd.'s license applications contained "fraudulent representations or omissions," that is, whether in keeping with the Government's theory of the case, the mailed video poker license applications failed to disclose hidden interests of Fred Goodson and Carl Cleveland in TSG, Ltd., as owners, option holders, or pledge recipients.[13] Cleveland contends that the jury could not fairly decide who owned TSG, Ltd. without knowing whether Goodson or Cleveland had enforceable ownership interests under state law.

We disagree. The jury was instructed to find whether the video poker license applications were fraudulent in so far as

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[13] The district court instructed the jury that an essential element of mail fraud--distinct from specific intent--is that a defendant knowingly created a scheme to defraud. Such a scheme, according to the district court's instructions, must involve false or fraudulent representations or omission reasonably calculated to deceive persons of ordinary prudence and comprehension.

affidavits submitted by Maria and Alex Goodson failed to mention any (1) agreements or understandings with any other persons to hold their interests as a nominee, agent or otherwise, and/or (2) agreements or understandings with any other person and a present intent to transfer at any future time any interest whatsoever in TSG, Ltd. Whether the "agreements or understandings" were enforceable under state law is not relevant to the question of whether Maria and Alex Goodson failed to disclose such arrangements to the Louisiana State Police. Accordingly, we find that the district court did not abuse its discretion in refusing to charge the jury as requested by Appellants. *See Pennington*, 20 F.3d at 600 (explaining that reversal is warranted only if the requested instruction (1) was a substantially correct statement of the law, (2) was not substantially covered in the charge as a whole, and (3) concerned an important issue in the trial).

Fred Goodson, Maria Goodson, and Cleveland also challenge the district court's supplemental instruction to the jury. In particular, they contend that the district court erred in giving a supplemental instruction that ignored state-law ownership principles and embraced the Government's theory that ownership could be determined simply from informal discussions.

After deliberations began, the jury sought clarification of three issues: (1) the legal definition of a partnership in commendam, (2) how much control is given up by partners, and (3) who appoints a general manager. In response, the district court provided the jury a general description of a partnership in commendam and the authority of the general and limited partners. The court concluded its supplemental instruction by charging the jury, over defense objections: "It is for you to determine based on all the evidence in the case what

the parties' arrangements were as to control, ownership and management of Truck Stop Gaming, Ltd."

We find no reversible error.

A trial judge enjoys wide latitude in deciding how to respond to a question from the jury. "When evaluating the adequacy of supplemental jury instructions, we ask whether the court's answer was reasonably responsive to the jury's question and whether the original and supplemental instructions as a whole allowed the jury to understand the issue presented to it." *United States v. Mann*, 161 F.3d 840, 864 (5th Cir. 1998) (footnotes omitted) (quoting *United States v. Stevens*, 38 F.3d 167, 170 (5th Cir. 1994)). In this case, the court's supplemental instruction was reasonably responsive to the jury's questions. Moreover, as mentioned above, satisfaction of state law requirements for ownership transfers was not a critical issue to be decided by the jury.

F. Travel Act Jury Instructions

Bankston was convicted on two Travel Act counts, which incorporated Louisiana's public bribery statute. He argues that his conviction ought to be reversed because the district court abused its discretion in failing to submit to the jury proposed charges on gift, attempted bribery, and circumstantial evidence.

First, Bankston asserts that he was entitled to an instruction that it is legal for a legislator to receive a gift. Such an instruction, however, was unnecessary given the district court's charge that the Government had to prove beyond a reasonable doubt that Bankston, as the receiver of the bribe, acted "with the specific intent to be influenced in his conduct . . . as a Louisiana senator." Whether Bankston could lawfully receive a gift was wholly irrelevant to the jury's inquiry. Because the district court's Travel Act instruction was clear, detailed, and substantially covered the charge suggested by

Bankston, the court's refusal to instruct on gift does not amount to error.

Second, Bankston, complains that the district court refused to instruct the jury on the lesser included offense of attempted bribery under Louisiana law. He argues that, in Louisiana, such an instruction is not discretionary and that, had the jury found only attempted bribery, the elements of the Travel Act charge would not have been met. In federal prosecutions for violations of the Travel Act, we have never required that district courts instruct on lesser included offenses. Accordingly, we find Bankston's argument to be devoid of merit.

Third, Bankston argues that the district court committed reversible error by failing to instruct on Louisiana's "circumstantial evidence rule." Because we have squarely rejected efforts to graft non-substantive points of state law into RICO charges, Bankston's claim fails. *See, e.g., United States v. Brown*, 555 F.2d 407, 418 n.22 (5th Cir. 1977) (explaining that "'the reference to state law in the federal statute is for the purpose of defining the conduct prohibited' and is not meant to incorporate the state statute of limitations or procedural rules" (quoting *United States v. Revel*, 493 F.2d 1, 3 (5th Cir. 1974))).

G. Witness Testimony

Cleveland, Fred Goodson, and Maria Goodson claim that the Government elicited improper witness testimony from two law enforcement officials, FBI Special Agent Gross and State Police Lieutenant Blackwelder. They launch four attacks on Gross and Blackwelder's testimony: (1) that both witnesses testified to legal conclusions, (2) that both witnesses gave testimony in the form of opinion, (3) that both witnesses testified as to "ultimate issue[s] of fact," and (4) that Gross's testimony exceeded his limited "summary" capacity. Evidentiary rulings are reviewed for abuse of discretion. *See*

General Electric Co. v. Joiner, 522 U.S. 136, 118 S. Ct. 512, 517, 139 L. Ed. 2d 508 (1997).

We find that the district court did not abuse its disretion in permitting the challenged testimony. Because neither Gross nor Blackwelder was designated as an expert witness, most of the caselaw that Cleveland cites for the proposition that a witness cannot testify in the form of an opinion is inapplicable. Unlike expert witnesses, lay persons are allowed more leeway under the Federal Rules in testifying in the form of opinions. *See* Fed. R. Evid. 701. Lay persons are explicitly allowed to testify in the form of opinion or inference on "ultimate issue[s] to be decided by the trier of fact." Fed. R. Evid. 704. Additionally, witnesses can testify in more than one capacity. *See United States v. Castillo*, 77 F.3d 1480, 1499 (5th Cir. 1996) (noting that a summary witness could testify in multiple capacities). Accordingly, Special Agent Gross could have testified as a lay fact witness as well as a summary witness. Having reviewed both Agent Gross's and Lieutenant Blackwelder's testimony, we find no reversible error.

H. Magazine Article Admission

Fred Goodson, Carl Cleveland, and Bankston challenge the district court's admission of a magazine article titled "Lies, Bribes and Videotape," found in the FBI's search of Fred Goodson's office. The district court admitted the article during redirect examination of FBI Special Agent Gross and instructed the jury that the article was being admitted not for the truth of the matter asserted, but solely on the issue of the state of mind of Fred Goodson, i.e., to contradict his assertions that he lacked knowledge and sophistication about politics and the types of transactions at issue. Evidentiary rulings are accorded considerable deference on appeal; "error may not be predicated upon a ruling which admits or excludes evidence unless a

substantial right of the party is affected." Fed. R. Evid. 103(a); *see United States v. E. ito*, 136 F.3d 397, 412 (5th Cir. 1998).

Fred Goodson and Cleveland contest the admissibility of the article both as to relevance and as to prejudicial effect. Even were the article both irrelevant and prejudicial, however, its admission did not affect a substantial right of either Goodson, Cleveland, or Bankston. First, the district court did not allow introduction of the article by the Government until redirect examination. Second, the district court permitted only "narrow clarifying" references to the article in light of the defense's introduction, on cross examination, of other documents etc. that had been found in the same folder as the "Lies, Bribes and Video Tape" article. Third, the Government's redirect regarding the disputed article constituted less than four pages of transcript. Fourth, on recross, the defense had the opportunity to question Agent Gross in detail about the subject matter of the article and elicited from him representations that the investigation described in the article in no way involved "anybody in this room."

For these reasons, we find that the admission of the "Lies, Bribes and Video Tape" article did not affect a substantial right of any appellant.

I. Prosecutor's Closing Remarks

All appellants claim that in his rebuttal argument the prosecutor made improper and inflammatory remarks, inviting the jury to convict the defendants in order to "make a change" and to "start taking back [their] state." Appellants argue that the district court's subsequent instruction failed to cure the taint of the improper closing and that reversal is therefore required.[14]

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[14] The district court, both at trial and in its opinion on defendants' motions for new trial, recognized the impropriety of the prosecutor's "make

A criminal defendant bears a substantial burden when attempting to demonstrate that improper prosecutorial comments constitute reversible error. "'A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'" *United States v. Lowenberg*, 853 F.2d 295, 302 (5th Cir. 1988) (quoting *United States v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 1044, 84 L. Ed. 2d 1 (1985)). Improper prosecutorial comments require reversal only if the comments substantially affected the defendant's right to a fair trial. *See United States v. Murrah*, 888 F.2d 24, 27 (5th Cir. 1989). In evaluating the extent to which prosecutorial comments affected a defendant's right to a fair trial, three factors are considered: the magnitude of the prejudicial effect of the remarks, the efficacy of any cautionary instruction, and the strength of the evidence of the defendant's guilt. *See United States v. Casel*, 995 F.2d 1299, 1308 (5th Cir. 1993).

Here, the inflammatory remarks, to which defense counsel objected at trial, came at the end of the prosecutor's rebuttal argument. The improper prosecutorial comments responded to improper arguments made by counsel for Rayburn. Any prejudicial effect inhering to the Goodsons, Bankston, and/or Cleveland, it seems, would have been substantially less than that attaching to Rayburn. Rayburn's acquittal therefore

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a change" closing. At the conclusion of the prosecutor's argument, the court instructed the jury to disregard the prosecutor's improper remarks:

> I would like to instruct you again that this case is not about the general conditions in the state of Louisiana. To the extent that Mr. Manger made reference to that in his closing argument, you are instructed to disregard the comments about the general condition of Louisiana state government as it relates to education or other issues.

suggests that the jury was not influenced by the improper comments.[15]

With regard to the efficacy of the district court's instruction, the court more than once instructed the jury to disregard the improper arguments. The language the court adopted when instructing the jury for the second time was in part borrowed from the words of Bankston's attorney. We find sufficiently curative both the district court's repeated instruction to disregard the improper argument as well as its caution to the jury that lawyer argument was not evidence.

Finally, as to the strength of the evidence of guilt, our review of the trial record in its entirety reveals that the evidence presented by the Government was sufficient to support each of the convictions against each of the appellants. Thus, we conclude that the prosecutorial comments did not substantially affect the Goodsons', Cleveland's, or Bankston's respective rights to a fair trial.

J. Sufficiency of the Evidence

Fred Goodson, Maria Goodson, and Larry Bankston contest the sufficiency of the evidence to support their respective convictions. In evaluating the sufficiency of the evidence on appeal, we consider the evidence in the light most favorable to the Government, drawing all reasonable inferences in support of the jury's verdict. *See United States v. Lopez*, 74 F.3d 575, 577 (5th Cir. 1996). The evidence is sufficient if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*,

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[15] Appellants argue that Rayburn's "sympathy" acquittal is of little significance because he was 80 years old at the time of the trial. Rayburn, however, was not the only defendant acquitted of charges. The fact that each appellant was found not guilty on some counts suggests that the jury reached its verdict free of the taint of the prosecutor's improper remarks

443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *United States v. Gaytan*, 74 F.3d 545, 555 (5th Cir. 1996). The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence. *See Lopez*, 74 F.3d at 577.

We address the arguments raised by each appellant in turn.

1. Fred Goodson

Fred Goodson argues that the evidence is insufficient to support his two-count conviction for mail fraud because it fails to establish that he had the specific intent to commit fraud.

To establish a mail fraud violation under 18 U.S.C. § 1341, the Government must demonstrate (1) a scheme to defraud, (2) the use of mails to execute that scheme, and (3) the defendant's specific intent to commit fraud. *See United States v. Tencer*, 107 F.3d 1120, 1125 (5th Cir. 1997). "Intent to defraud requires an intent to (1) deceive, and (2) cause some harm to result from the deceit." *United States v. Jimenez*, 77 F.3d 95, 97 (5th Cir. 1996). A defendant has the intent to defraud if he acts knowingly with the specific intent to deceive for the purpose of causing pecuniary "loss to another or bringing about some financial gain to himself." *United States v. Blocker*, 104 F.3d 720, 732 (5th Cir. 1997).

According to Goodson, the mail fraud charges rested on two premises: that he and Cleveland were the "true owners" of Truck Stop Gaming, and that they hid that fact from regulators in order to avoid a suitability investigation of their finances. Goodson, on appeal, contests the sufficiency of the evidence only as it relates to the second premise--Goodson and Cleveland's avoidance of a suitability investigation.

This second premise, however, does not constitute an essential element of mail fraud. Instead, the desire to avoid a suitability investigation relates merely to motive, representing the Government's theory as to why Cleveland and Goodson committed the fraud. Because we have never required the Government to prove nor the jury to find motive beyond a reasonable doubt, Fred Goodson's argument fails.

2. Maria Goodson

Maria Goodson challenges the sufficiency of the evidence for her mail fraud conviction. She claims that the Government failed to establish that she knowingly, and with specific intent to defraud, participated in a scheme to hide either (1) the true ownership interests of her father and Carl Cleveland in TSG, Ltd. or (2) the 4.99% ownership interest held by Benny Rayburn, Jr.

Because the jury need only have found Maria Goodson guilty beyond a reasonable doubt on one of the two potential schemes underlying her mail fraud conviction, we address only the evidence concerning Maria Goodson's specific intent to conceal the 4.99% ownership interest transferred to Benny Rayburn. The Government presented the jury with a document dated August 1, 1994, signed by Maria Goodson in which she agreed to "assign, sell, convey and deliver unto Benjamin B. Rayburn, Jr. a 4.99% interest out of a 100% interest in the Truck Stop Gaming, Ltd. partnership." Evidence showed that the transfer of this interest was not reported to the State Police in TSG, Ltd.'s 1995 license renewal application, even though such minority purchases were required to be reported.

Maria Goodson's awareness of the transfer of ownership is indicated by two pieces of evidence. First, she signed the conveyance itself. Second, in a recorded conversation between Maria Goodson and family accountant Joe Morgan, she

described BAJ, LLC, the limited liability company to which Rayburn ultimately transferred his 4.99% interest, as having become a 4.9% partner. Accordingly, we find that the jury had sufficient evidence to convict Maria Goodson for mail fraud.

3. Larry Bankston

Larry Bankston contests the sufficiency of the evidence as to his conviction on two counts of violating the Travel Act, 18 U.S.C. § 1952 (1997). The first count involved an interstate telephone call on June 20, 1995, from Fred Goodson to Meyer Realty to set up what was alleged to have been a bribe in the form of a "sham" rental of Bankston and his wife's Gulf Shores condominium. The second involved Fred Goodson's use of an interstate commercial carrier on June 22, 1995, to forward a $1,555.01 check to Meyer Realty as payment for the condominium rental.

The essential elements for a Travel Act conviction are:

(1) travel or use of the mail or any facility in interstate or foreign commerce;

(2) with the specific intent to promote, manage, establish, or carry on--or distribute the proceeds of--unlawful activity; and

(3) knowing and willful commission of an act in furtherance of that intent subsequent to the act of travel or use of the mail or facility of interstate or foreign commerce.

See United States v. Logan, 949 F.2d 1370, 1380-81 (5th Cir. 1991). Under Louisiana law, an elected official is guilty of public bribery if he accepts anything of apparent present or prospective value with the specific intent to be influenced in his employment, position, or duty. *See* La. Rev. Stat. Ann. § 14:118 (West Supp. 1999).

Bankston attacks the sufficiency of the evidence on three separate grounds: (1) insufficient proof that he had the requisite intent to be influenced in his official conduct by the condominium rental; (2) insufficient proof that the condominium rental amounted to anything more than a legal gift; and (3) insufficient proof that he committed an overt act in furtherance of the alleged bribery after the interstate communications at issue.

The evidence at trial does not support Bankston's claim. The evidence showed that in February 1995 Bankston and his wife discussed establishing an arrangement whereby a proposed "renter" would pay to use their Alabama condominium despite the renter's true intention not to do so. Records from Meyer Realty showed that Fred Goodson rented the Bankstons' condominium and paid for the rental by check. Testimony from FBI agents revealed that the Bankston family, not Goodson, used the condominium during the rental week in question. Finally, the jury heard many intercepted conversations between Bankston and others in which Bankston indicated that he would use the power of his office to protect Goodson's video poker interests during the legislative session. Based upon this evidence, we affirm Bankston's conviction on the two Travel Act counts.

K. Sentencing

1. Maria Goodson

a. Section 5K2.7 Upward Departure

Maria Goodson complains that the district court improperly enhanced her offense level six points for a "significant disruption of governmental function," pursuant to

U.S. Sentencing Guideline section 5K2.7.[16] She argues that the disruption identified by the district court is not the type of "significant" disruption that the Commission contemplated when drafting section 5K2.7 and that, although the submission to a state agency of one false application may disrupt the agency's function, it only does so in an "ordinary" sense. We disagree.

A district court has "wide discretion" in imposing a section 5K2.7 upward departure. *United States v. Hatch*, 926 F.2d 387, 397 (5th Cir. 1991) (explaining that the Fifth Circuit has repeatedly granted district courts "wide discretion to decide whether aggravating factors exist to support an upward departure"). The appropriateness of a departure turns on the importance of the government function impacted, not the degree of the impact. *Cf. Hatch*, 926 F.2d 387 (affirming a 5K2.7 upward departure based on the defendant, a former Louisiana sheriff, authorizing payments, representing a portion of the sheriff office's operating budget, to a purported jail construction project consultant); *United States v. Garcia*, 900 F.2d 45 (5th Cir. 1990) (holding that an upward departure was warranted and reasonable where postal inspectors recovered 248 first-class letters from the possession of a defendant postal employee). Here, when Maria Goodson submitted TSG, Ltd.'s

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[16] Section 5K2.7 provides in part:

> If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

false 1995 renewal application, failing to disclose any ownership interest held by Fred Goodson, Carl Cleveland, or Benny Rayburn, she effectively shielded those men from suitability analysis. In doing so, Maria Goodson thwarted Louisiana's video poker regulatory and licensing scheme designed to investigate the honesty and integrity of prospective license holders. Based upon the importance of that regulatory scheme, we find that the district court did not abuse its discretion in imposing a section 5K2.7 upward departure.

b. Loss Calculation

The Government, in its cross-appeal, contends that the district court miscalculated Maria Goodson's offense level. Maria Goodson was convicted of one count of mail fraud in connection with TSG, Ltd.'s 1995 license renewal application. The district court sentenced her in accordance with section 2F1.1 of the Sentencing Guidelines. That section specifies a base offense level of six for fraud and provides for incremental increases in the offense level depending on, inter alia, the amount of loss caused by the fraud. *See* U.S. Sentencing Guidelines Manual § 2F1.1 (1997). In calculating Maria Goodson's offense level, the court found that the State of Louisiana had suffered no "actual or intended monetizable loss . . . by virtue of Ms. Goodson's having fraudulently obtained the license." Accordingly, the district court did not increase Ms. Goodson's base offense level for any loss.

The Government asserts that the district court erred in finding that the State of Louisiana suffered no loss and in failing to use defendant's gain as an alternative method of valuation. The Government asserts that, in keeping with section 2F1.1's Application Note 8, Maria Goodson's base offense level should have been increased eleven levels based upon TSG, Ltd.'s $1.4 million annual gain. *See* U.S. Sentencing Guidelines Manual § 2F1.1 App. Note 8 (1997); *see also United States v.*

Smithson, 49 F.3d 138, 144 (5th Cir. 1995) (recognizing that under section 2F1.1, Application Note 8, a sentencing court may utilize the offender's gain as an alternative valuation method for assessing the amount of loss when the loss is difficult to determine).

In its sentencing cross-appeal, the Government urges use of TSG, Ltd.'s $1.4 million annual revenues as the appropriate valuation of Maria Goodson's gain, yet throughout trial and all subsequent forfeiture proceedings, the Government argued that Maria Goodson, in fact, was not the "true owner" of TSG, Ltd. The verdict of the jury as well as the district court's judgment of forfeiture confirmed the success of the Government's hidden ownership theory of prosecution. Accordingly, we consider Fred Goodson and Carl Cleveland the true owners of TSG, Ltd. and agree that TSG, Ltd.'s $1.4 million gain could not be attributed to Maria Goodson, a non-owner. Therefore, the district court did not err in refusing to use TSG, Ltd.'s $1.4 million annual revenues as an alternative valuation method for loss pursuant to section 2F1.1.

2. Bankston

a. Eleven-level Enhancement

Bankston challenges as unsupported by the evidence the district court's eleven-level increase in his base offense level under section 2C1.1(b)(2)(A). This Court examines a district court's factual findings only for clear error and affords great deference to the court's application of the Guidelines to those facts. *See United States v. Snell*, 152 F.3d 345, 346 (5th Cir. 1998).

The district court, relying on the Presentence Report ("PSR") as well as facts elicited at trial and the forfeiture proceeding, based Bankston's offense level enhancement on its calculation of the "expected benefit to be received by the

individual paying the bribe," namely Fred Goodson.[17] The district court found that the benefit to be received by Goodson in return for the bribe was protection for a two-year period from legislation that would otherwise interfere with the continued operation of his video poker business. The district court, recognizing that evidence at trial supported a finding that Goodson held a 50% interest in TSG, Ltd., determined that the expected benefit to be received by Goodson was one-half the profits to TSG, Ltd. for a two-year period, or $1.4 million. We find the district court's "Reasons for Sentencing of Larry S. Bankston" to be thorough and well-reasoned. Bankston's assertion of error is meritless.

b. Expected Benefit

The Government, on cross-appeal, argues that the district court erroneously reduced the expected benefit to be received for the bribe to the ownership percentage in TSG, Ltd. of the briber, Fred Goodson. Specifically, the Government contends that the district court erred in limiting "benefit" as used in section 2C1.1(b)(2)(A) to "personal benefit," failing to consider the actual benefit sought, the continued unfettered operation of the RICO enterprise. The issue raised by the Government is one of first impression for this Circuit.

It is well established that sentencing courts are bound by "commentary in the Guidelines Manual that interprets or explains a guideline . . . unless it violates the Constitution or a federal statute, or is inconsistent with, or [is] a plainly erroneous reading of, that guideline." *See Stinson v. United*

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[17] The Guidelines assign punishment at the greatest of three calculations: (1) the value of the bribe; (2) the value of the benefit to be received; or (3) if the offense involved payment for the purpose of influencing an elected official, an eight-level increase. *See* U.S. Sentencing Guidelines Manual § 2C1.1 (1997).

States, 508 U.S. 36, 38, 113 S. Ct. 1913, 1915, 123 L. Ed. 2d 598 (1993). The Commentary to section 2C1.1 states that for deterrent purposes, the punishment should be commensurate with the "gain to the payer or the recipient of the bribe," whichever is higher. As contemplated by the Commission, the "gain to the payer" is the "value of the benefit received or to be received." Thus, the expected benefit to be received as referenced in section 2C1.1 is the benefit to the payer of the bribe.

Resolution of the Government's cross-appeal, therefore, turns on the identity of the "payer." If Fred Goodson, in his individual capacity, bribed Bankston, then the district court properly limited "expected benefit" to an amount equivalent to Goodson's personal benefit. If, on the other hand, Fred Goodson, as agent for TSG, Ltd., bribed Bankston, then the Government would be correct that the expected benefit ought to be measured by the profits to the RICO enterprise.

The issue of the identity of the payer is a question of fact best resolved by the district court. Because the evidence presented at trial could support either the individual-capacity or RICO-enterprise theory of bribery, we cannot conclude that the district court committed clear error in determining that the personal benefit to Goodson was the appropriate valuation of the expected benefit to be received.

L. RICO Forfeiture

A person who violates RICO must forfeit any interest acquired or maintained in violation of the statute, any enterprise established or conducted in violation of RICO, and any property constituting or derived from proceeds obtained in violation of RICO. *See* 18 U.S.C. § 1963(a). Here, the Government sought, and the district court ordered, the forfeiture of both Fred Goodson's and Carl Cleveland's

interests in TSG, Ltd., in an amount equal to the proceeds received by TSG, Ltd. between July 1994 and August 1995. Fred Goodson,[18] Carl Cleveland, Maria Goodson, Alex Goodson, and TSG, Inc. appeal, albeit on different grounds, the district court's judgment of forfeiture.

With regard to Fred Goodson's and Carl Cleveland's claim, we note that the district court ordered that the proceeds of TSG, Ltd. be forfeited pursuant to 18 U.S.C. § 1963(a)(1) and (a)(2), as well as (a)(3). Goodson, though, attacks only two of these three grounds. He raises no error as to the forfeiture of proceeds under § 1963(a)(3). Given the identity of proceeds forfeited pursuant to each theory, we affirm the district court's August 1997, forfeiture order.

Maria Goodson, Alex Goodson, and TSG, Inc. argue that the district court erred in failing properly to apply Louisiana law to the question of ownership of TSG, Ltd. and TSG, Inc. They assert that no state law exists that would support the district court's ruling that Fred Goodson and Carl Cleveland were the "true owners" of TSG, Ltd.

Section 1963(1)(6)(A) provides petitioners the opportunity to recoup forfeited property if they can establish by a preponderance of the evidence either (1) that they have a current legal right, title, or interest in the property *and* that the right, title, or interest was vested in them instead of the defendant at the time of the commission of the RICO offenses; or (2) that they have a current legal right, title, or interest in the property and that the right, title, or interest was superior to the right, title, or interest of the defendant at the time of the commission of the RICO offenses. *See* 18 U.S.C. § 1963(1)(6)(A). We review the district court's findings of fact

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[18] Carl Cleveland incorporates Fred Goodson's forfeiture arguments.

under the clearly erroneous standard of review and the question of whether those facts constitute legally proper forfeiture de novo. *See United States v. Marmolejo*, 89 F.3d 1185, 1197 (5th Cir. 1996).

Maria and Alex Goodson assert that they are the record owners of TSG, Ltd. and its corporate general partner, TSG, Inc. They point to TSG, Ltd.'s Agreement of Partnership, which they both signed and which was filed with the Louisiana Secretary of State, as evidence of their current and superior interest in the forfeited companies. They urge us to find that the district court improperly disregarded their partnership agreement when it concluded that Fred Goodson and Carl Cleveland were the true owners of TSG, Ltd.

We agree with the district court's decision not to allow an obviously false partnership agreement to be used to provide the basis for a claim of interest under § 1963(1)(6)(A). As the district court indicated, the jury's verdict in the instant case established that Fred Goodson, Maria Goodson, and Carl Cleveland perpetrated a fraud on the State of Louisiana. The jury necessarily found that Fred Goodson and Carl Cleveland were the true owners of TSG, Ltd. and that Maria Goodson and her brother Alex were straw people used in the sham to hide the true ownership of TSG, Ltd.

Testimony at the October 31, 1997 evidentiary hearing to determine the interests of Alex and Maria Goodson bolsters our resolve not to allow them to assert ownership in the TSG entities based upon their "sham" partnership agreement. With regard to Alex Goodson, the district court found that his hearing testimony revealed that he did not consider himself to have any real interest in either TSG, Inc. or TSG, Ltd. Alex described his involvement with the companies as someone executing an ownership document as an agent of the company, in the capacity of a nominee. His testimony revealed that he

had no understanding of the "contribution" that was attributed to him in the partnership agreement for TSG, Ltd. As to Maria Goodson, the court found that her testimony likewise "fell short of establishing that she and her brother . . . were the true owners of the Truck Stop Gaming entities." In particular, Maria Goodson told the court at the forfeiture hearing that at the time the companies were formed and incorporated, she did not associate a company being "in her name" with ownership. Equally problematic was a conversation with Carl Cleveland in which she requested 1% of the net profits of TSG, Ltd. If she had in fact been the owner of the TSG entities, she would not have needed to ask Carl Cleveland for an interest in a percentage of the companies' profits.

In light of the above evidence, the district court properly disregarded the "sham" partnership agreement. Consistent with the detailed analysis provided in the district court's April 1998 order, we conclude that Alex Goodson, Maria Goodson, and TSG, Inc. failed to demonstrate by a preponderance of the evidence a legal right, title, or interest in TSG, Ltd. Their appeal of the district court's April 1998 judgment of forfeiture, therefore, fails.

III. CONCLUSION

Appellants raise an abundance of evidentiary, statutory, and constitutional challenges, none of which warrant reversal. For the reasons stated above, we affirm each Appellant's judgment of conviction and sentence as well as the judgment of forfeiture.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Criminal Action No. 96-207

UNITED STATES of America

v.

Carl W. CLEVELAND, Fred H. Goodson,
Maria F. Goodson, Joe H. Morgan,
Benjamin Bura Rayburn, Sr.
aka "B.B. Sixty Rayburn" and Larry S. Bankston

Jan. 14, 1997

ORDER AND REASONS

VANCE, District Judge

I. Introduction

This criminal case involves allegedly illegal activity in the video poker industry in Louisiana. The defendants are former Louisiana State Senators Benjamin ("B.B. Sixty") Rayburn and Larry S. Bankston; an attorney, Carl Cleveland; an accountant, Joe H. Morgan; and two alleged video poker entrepreneurs, Fred H. Goodson and his daughter, Maria F. Goodson.

The government charges each of the defendants with racketeering and racketeering conspiracy and charges various defendants with mail fraud, conducting an illegal gambling business, interstate communications in aid of racketeering, conspiracy to defraud the United States, filing of a false income tax return, false declaration under penalty of perjury, aiding and

abetting false declaration under penalty of perjury, and money laundering. Defendant Fred Goodson ("Goodson") challenges certain counts of the indictment as predicated on constitutionally infirm criminal statutes and claims that other charges should be dismissed because a video poker license does not constitute the "money or property" needed to support a federal mail fraud conviction. For the reasons stated below, both of Goodson's motions are DENIED.

II. Defendant Fred Goodson's Motion to Dismiss All Illegal Gambling Counts, All Money Laundering Counts, and All Racketeering Acts Predicated on Either Illegal Gambling or Money Laundering Counts

A. Background: Commerce Clause Jurisprudence and *Lopez*

Defendant Fred Goodson moves to dismiss racketeering acts 1e, 2a, 2b, 2c, 2d, 2e, Count 7, and Counts 8 through 12 of the superseding indictment on the grounds that the criminal statutes on which these allegations are based, 18 U.S.C. § 1955 (conducting an illegal gambling enterprise), and 18 U.S.C. § 1956 (money laundering), are facially unconstitutional or, alternatively, that the application of these statutes to this case is unconstitutional in that it constitutes a violation of the Commerce Clause and the Tenth Amendment of the United States Constitution.

It is a fundamental principle of constitutional law that the federal courts are courts of limited jurisdiction and that federal criminal jurisdiction is limited to cases arising under the United States Constitution or federal law. *See* U.S. Const. Art III, § 2. The Constitution specifically enumerates only five criminal

activities.[1] All other federal crimes are the product of Congressional statutes. Congress, however, is not free to pass any criminal statute it deems appropriate. Rather, to pass constitutional muster, all federal criminal statutes must be passed pursuant to one of the specifically enumerated powers in the Constitution. Defendant attacks the constitutional validity of 18 U.S.C. § 1955 (conducting an illegal gambling enterprise) and 18 U.S.C. § 1956 (money laundering) by arguing that neither statute was passed pursuant to a specifically enumerated Congressional power. Defendant maintains that both statutes regulate activity that falls outside the scope of Congress' power to regulate interstate commerce under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3.[2] The Fifth Circuit has already upheld both statutes in question under the Commerce Clause. *See United States v. Gallo*, 927 F.2d 815, 822 (5th Cir. 1991) (recognizing the validity of 18 U.S.C. § 1956); *United States v. Harris*, 460 F.2d 1041, 1044 (5th Cir. 1972) (upholding 18 U.S.C. § 1955). Defendant nevertheless argues that this Court should reconsider those decisions in light of the United States Supreme Court's recent decision in *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995).

In *Lopez*, the Supreme Court struck down the Gun Free School Zone Act ("the GFSZA"), a federal statute making it a crime to knowingly possess a firearm in a school zone, on the

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[1] These enumerated crimes are counterfeiting, U.S. Const. Art I § 8, cl. 6; piracy on the high seas, U.S. Const. Art I § 8, cl. 10; treason, U.S. Const. Art III § 3, cl. 2; offenses against the law of nations, U.S. Const. Art III, cl. 6; and offenses supporting impeachment, U.S. Const. Art I § 3, cls. 6 and 7.

[2] The Commerce Clause states that "the Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." U.S. Const. art. I, § 8, cl. 3.

grounds that it exceeded the authority of Congress under the Commerce Clause. *Lopez* marked the first time since 1936 that the Supreme Court invalidated a federal statute under the Commerce Clause and clearly indicated a shift towards a more restrictive view of Congress' powers under the Commerce Clause than had been espoused in the past.[3]

The *Lopez* Court enumerated three categories of activity that Congress may regulate under its commerce power:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

Lopez, 514 U.S. at —— , 115 S. Ct. at 1629-30 (internal citations omitted).

The Court found that the GFSZA did not meet either of the first two categories and thus could be upheld only if the statute regulated an activity that "substantially affected interstate commerce." *Id.* In this case, all parties agree that the activities regulated under the statutes in question--illegal gambling and

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[3] For the storied history of the Court's interpretation of the Commerce Clause, *see Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 1626-29, 131 L. Ed. 2d 626; Laurence Tribe, *American Constitutional Law* § 5-4 to 5-7, at 305-13 (2d ed. 1988) (describing initial view that Commerce Clause powers were broad, giving way to a "formalistic" reading of the Commerce Clause, in turn giving way to a "virtually unbounded" reading of the Commerce Clause prior to *Lopez*).

money laundering--clearly do not fall under the first two *Lopez* categories. As in *Lopez*, the Court's Commerce Clause analysis is therefore confined to the third *Lopez* category and the application of the "substantial effects" test. Defendant argues that neither illegal gambling nor money laundering has the requisite "substantial effect" on interstate commerce to permit federal regulation under the Commerce Clause after *Lopez*.

B. Standard of Review

Under *Lopez*, this Court must determine whether a rational basis exists for concluding that the activity to be regulated substantially affected interstate commerce. Chief Justice Rehnquist, in the majority opinion, stated:

> In [*National Labor relations Board v. Jones & Laughlin Steel*, [301 U.S. 1, 57 S. Ct. 615, 81 L.Ed. 893] [(1937)], the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.' (citations omitted). Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.

Lopez, 514 U.S. at ——, 115 S. Ct. at 1629 (citing *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 276-80, 101 S. Ct. 2352, 2360-62, 69 L. Ed. 2d 1 (1981)).

Further, although the rational basis test was not new to the Court's Commerce Clause analysis, the Supreme Court applied the test with more rigor in *Lopez* than it had in the past. The *Lopez* Court did not, however, establish precise guidelines for determining whether an activity can be rationally found to have a substantial effect on interstate commerce. Rather, finding that the GFSZA did not regulate activity that substantially affected interstate commerce, the *Lopez* Court found three deficiencies in the statute. First, the GFSZA by its terms "had nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms" *Lopez*, 514 U.S. — at —, 115 S. Ct. at 1630-31. Second, the GFSZA "contained no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affected interstate commerce." *Id.* at 1631. Third, there were no express Congressional findings regarding the effects upon interstate commerce, and the arguments advanced in their absence would permit limitless assertions of federal power. *Id.* at 1632.

While the Court found that the statute failed to satisfy all of these considerations, it did not assign the relative weights to be accorded each of these factors. It has been suggested that the Court left unclear, for example, whether a statute must satisfy all three of the *Lopez* considerations to be constitutional or whether it simply needs to satisfy one of them. *See United States v. Wall*, 92 F.3d 1444, 1460 (6th Cir. 1996) (Boggs, J., concurring in part and dissenting in part) ("Because the GFSZA satisfied none of the three subparts, the Court did not have to face the[] question [of the relationship between the subparts]. But [this question] cannot be ignored."). The Fifth Circuit's post-*Lopez* decisions do not directly address this issue either.

C. The Fifth Circuit's Post-*Lopez* Jurisprudence

Since *Lopez*, the Fifth Circuit has had two occasions to examine the validity of various federal criminal statutes in light

of *Lopez*, and both times the Court has distinguished the statute at issue from the one struck down in *Lopez*. *See United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996) (upholding 18 U.S.C. § 922(g), prohibiting possession by a felon of a firearm shipped in interstate commerce); *United States v. Coleman*, 78 F.3d 154, 158 (5th Cir.), *cert. denied*, 136 L. Ed. 2d 161, 117 S. Ct. 230 (1996) (upholding 18 U.S.C. § 2119, prohibiting carjacking); *see also United States v. Kuban*, 94 F.3d 971, 973 (5th Cir. 1996) (upholding Section 922(g) by summarily citing *Rawls*).[4]

In *United States v. Coleman*, the Court clarified that the type of rational basis review required under *Lopez* is a deferential form of review. Citing *Lopez*, the Coleman Court held:

> In reviewing an act of Congress passed pursuant to the Commerce Clause, courts traditionally defer to Congress because 'the Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise.' *Lopez*, 514 U.S. at —, 115 S. Ct. at 1634 (Kennedy, J., concurring). The proper inquiry on review is 'whether a rational basis existed for [Congress] concluding that a regulated activity sufficiently affected interstate commerce.' *Id.* at —, 115 S. Ct. at 1629.

Coleman, 78 F.3d at 157-58.

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[4] The Court notes that the Fifth Circuit had a third occasion to rule on the constitutionality of a federal criminal statute under the Commerce Clause post-*Lopez*. *See United States v. Kirk*, 70 F.3d 791, 795-96 (5th Cir. 1995) (upholding 18 U.S.C. § 922(o), prohibiting the transfer or possession of machine guns manufactured or illegally transferred after May 19, 1986). However, the decision in Kirk was recently vacated, and the case is presently pending before the en banc court. *See* 78 F.3d 160 (1996).

The *Coleman* Court went on to find the carjacking statute constitutional and distinguished it from the statute in *Lopez* because "the carjacking statute has none of the deficiencies noticed by the Supreme Court [in *Lopez*]--lack of any connection with commerce or economic enterprise, broadly defined; lack of a jurisdictional element; and lack of congressional findings on the nexus with interstate commerce." *Coleman,* 78 F.3d at 159.

In *United States v. Rawls,* the Fifth Circuit found 18 U.S.C. § 922(g), a federal statute prohibiting possession by a felon of a firearm shipped in interstate commerce, constitutional under the Commerce Clause. The Court in *Rawls* had the benefit of five other circuit court opinions on the same issue, each of which had concluded that Section 922(g) was constitutional under the Commerce Clause. In light of the extensive amount of persuasive authority supporting the constitutionality of the statute, the Court declined to provide an exhaustive analysis of the issue. *See Rawls,* 85 F.3d at 242. The *Rawls* Court did, however, distinguish Section 922(g) from the GFSZA on the basis that Section 922(g) contained a jurisdictional element, which limited the regulated activity to possession of firearms that had previously traveled in interstate commerce. The Court held that "central to the Court's holding in *Lopez* was the fact that § 922(q) contained 'no jurisdictional element which would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce.'" *Id.* (quoting *Lopez,* 514 U.S. at —, 115 S. Ct. at 1631). Further, every case the Court cited in support of its ruling had justified the post-*Lopez* constitutionality of the statute on the existence of the statutory jurisdictional element. *See United States v.* Sorrentino, 72 F.3d 294, 296 (2d Cir. 1995); *United States v. Bell,* 70 F.3d 495, 498 (7th Cir. 1995); *United States v. Shelton,* 66 F.3d 991, 992 (8th Cir. 1995), *cert. denied,* — U.S. —, 116 S. Ct. 1364, 134 L. Ed. 2d 530

(1996); *United States v. Hanna*, 55 F.3d 1456, 1462 & n.2 (9th Cir. 1995); *United States v. Collins*, 61 F.3d 1379, 1383-84 (9th Cir.), *cert. denied*, — U.S. —, 116 S. Ct. 543, 133 L. Ed. 2d 446 (1995); *United States v. Bolton*, 68 F.3d 396, 400 (10th Cir. 1995), *cert denied*, U.S. , 116 S. Ct. 966, 133 L. Ed. 2d 887 (1996). *Rawls'* emphasis on the centrality of the jurisdictional element and the case law it relies on suggest that the presence of a jurisdictional element permits a finding of constitutionality, without the need to address the other two *Lopez* considerations.

In summary, the relevant inquiry post-*Lopez*, is "whether a rational basis existed for [Congress] to conclude that a regulated activity sufficiently affected interstate commerce." *Coleman*, 78 F.3d at 157-58. The Court finds that this deferential standard can be met by a showing that the activity to be regulated satisfies any one of the *Lopez* considerations. This follows because each of the considerations appear to be sufficient to furnish the requisite nexus, i.e., either the activity is connected with interstate commerce or an economic enterprise (i.e., the traditional turf of the Commerce Clause), or Congress requires a nexus with interstate commerce in each case to assert jurisdiction over the activity, or there are Congressional findings that support the conclusion that a rational basis existed for Congress to conclude that the activity in issue substantially affects interstate commerce. It would be redundant to require a separate jurisdictional statement if a case involves clear-cut commercial activity for which the nexus with interstate commerce is obvious. Alternatively, if Congress expressly requires an effect on interstate commerce in each case to assert jurisdiction over a particular activity, Congressional findings are redundant. Moreover, it is clear from the structure of the *Lopez* opinion that a statute need not satisfy all three considerations to be constitutional. There would have been no need to discuss the third consideration, for example, if failure

to meet either one of the first two were sufficient to condemn the statute. Applying these principles, the Court will now examine the validity of each of the statutes in issue.

D. The Validity of Section 1955 After *Lopez*

18 U.S.C. § 1955 reads in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both. (b) As used in this section--(1) "illegal gambling business" means a gambling business which--(I) is a violation of the law of a State or political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day. (2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

18 U.S.C. § 1955.

Since the *Lopez* decision, one Circuit Court has reviewed the validity of 18 U.S.C. § 1955 under the Commerce Clause. In *United States v. Wall,* 92 F.3d 1444 (6th Cir. 1996), the Sixth Circuit applied the *Lopez* substantial effects test and concluded that Section 1955 is constitutional because it is a regulation of an activity having a substantial relationship to interstate commerce. This Court agrees with that conclusion.

First, the Court notes, as did the *Wall* Court, that Section 1955, unlike the statute struck down in *Lopez*, has a commercial aspect to it:

> On its face, [Section 1955] has a commercial aspect. It does not prohibit gambling per se; rather, it punishes those who 'conduct[ ]... an illegal gambling business.' 18 U.S.C. § 1955(a) (emphasis added). To sustain a conviction, Congress required federal prosecutors to demonstrate that a certain amount of commercial activity took place--the business had to 'remain[ ] in substantially continuous operation for a period in excess of thirty days or have a gross revenue of $2,000 in any single day.' *Id* § 1955(b)(1)(iii). Gambling itself, in its multiple forms, is a commercial activity. . . . By its terms, § 1955 is commercial in nature and is not favorably compared to possession of a gun in a school zone, which clearly does not involve commercial activity.

Wall, 92 F.3d at 1449.

It is true that the statute does not contain an explicit jurisdictional requirement. However, unlike the GFSZA, Section 1955 contains much legislative historical information to guide the Court in its determination of the reasonableness of Congress' conclusion that illegal gambling has a substantial effect on interstate commerce. Congress passed Section 1955 as part of Title VIII of the Organized Crime Control Act of 1970 in an attempt to attack sophisticated, large-scale illegal gambling operations, which Congress thought to be a major source of funding for organized crime. Congress made the following explicit findings regarding the effect of illegal gambling operations on interstate commerce:

> The Congress finds that (1) illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof; (2) illegal gambling is dependent upon facilities of interstate commerce for such purposes as obtaining odds, making and accepting bets, and laying off bets; (3) money derived from or used in illegal gambling moves in interstate commerce or is handled through the facilities thereof; (4) paraphernalia for use in illegal gambling moves in interstate commerce; and (5) illegal gambling enterprises are facilitated by the corruption and bribery of State and local officials or employees responsible for the execution or enforcement of criminal laws.

S. Rep. No. 91-617, 91st Cong., 1st Sess. 16 (1969).

Congress also "found that organized crime had developed complex channels through which ostensibly local gambling operations sent their revenues to central coffers." *United States v. Sacco*, 491 F.2d 995, 999 (citing President's Commission on Law Enforcement and Administration of Justice, Report: The Challenge of Crime in a Free Society 189 (1967) and Task Force Report: Crime and Its Impact--an Assessment 52-53 (1967)). Congress also concluded that large scale illegal gambling operations "distorted the production of goods for commerce and the flow of goods in interstate commerce." *Id.* (citing 116 Cong. Rec. 604 (1970) (remarks of Senator Allott), and 116 Cong. Rec. 35199 (1970) (remarks of Congressman St. Germain)). As the Fifth Circuit noted in *United States v. Harris*, "[t]he Congressional Record is filled with evidence to support the[se] conclusions. . . ." *Harris*, 460 F.2d at 1045 and n. 3 (noting that in considering passage of the Organized Crime Control Act of 1970, Congress had before it the 1967 Report of

President Johnson's Commission on Law Enforcement and the Administration of Justice).

Moreover, Congress's rationale offers a rational stopping point for the role of the federal government in regulating illegal gambling activities. Mindful of the Tenth Amendment and the rights of the states, Congress made a point of not regulating all illegal gambling activity, but rather only large scale operations that were likely to have a substantial impact on interstate commerce. This was the reason that Congress drafted the statute so that it covered only gambling businesses that "involve[ ] five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business" and that have "been or remained in substantially continuous operation for a period in excess of thirty days or has gross revenue of $2,000 in any single day." 18 U.S.C. § 1955(b)(ii) and (iii). This intention is evidenced by the following statement from the legislative history of Section 1955:

> The intent of . . . section 1955, below, is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. . . . The provisions of this title do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and those corrupt State and local officials who make it possible for them to function.

1970 U.S. Code Cong. and Admin. News 4029.

In light of this extensive record, this Court cannot find that Congress was unreasonable when it determined that gambling

businesses of the type regulated by Section 1955 have a substantial effect on interstate commerce. Nor does the Court find that acceptance of Congress's reasoning would lead to boundless federal power. In fact, this Court finds that Section 1955 was the result of reasoned findings concerning the impact of *large-scale, continuous* gambling operations on interstate commerce. Accordingly, the Court finds Section 1955 facially constitutional.

The Court also finds the statute to be constitutional as applied in this case. The Court agrees entirely with the analysis of the Sixth Circuit's majority in *Wall*, which found that Section 1955 was constitutional as applied to defendants who owned and operated an illegal business that leased video poker machines to various establishments, all of which were in the state of Tennessee. Even if, as defendant Goodson claims, the defendants' alleged behavior were totally local in nature, the as-applied challenge in this case would fail for the same reason the *Wall* Court gave for rejecting the as-applied challenges in that case. As the *Wall* Court concluded:

> In the case at hand, there was no evidence that defendants were engaged in a gambling enterprise that filled organized crime coffers. This case appears to be one of those 'rare instances where a gambling operation meeting the requirements of 1955 will be a local operation, in no way connected with organized crime.' *Sacco*, 491 F.2d at 1000. Congress, however, may regulate commercial activities that, although intrastate in nature, comprise a class of activities that substantially affect interstate commerce. Courts may not excise individual instances of a class of commercial activities that is within the reach of federal power. *Perez v. United States*, 402 U.S. 146, 154, 91 S. Ct. 1357, 1361, 28 L. Ed. 2d 686 (1971);

> *see also Lopez*, 514 U.S. at —, 115 S. Ct. at 1630. *Maryland v. Wirtz*, 392 U.S. 183, 192-93, 88 S. Ct. 2017, 2021-22, 20 L. Ed. 2d 1020 (1968); *Wickard v. Filburn*, 317 U.S. 111, 127-28, 63 S. Ct. 82, 90-91, 87 L. Ed. 122 (1942); *United States v. Pack*, 16 F.3d 1222, No. 92-3872, 1994 WL 19945 at *2 (6th Cir. Jan. 25, 1994) (per curiam) ("If the class of activities is within the reach of federal power and the regulation imposed is reasonable, a court's investigation is concluded. There is no need for inquiry on a case-by-case basis or proof that a particular activity had a [substantial] effect on commerce.") (quoting *Sacco*, 491 F.2d at 999); cf. [*United States v.*] *Gomez*, 87 F.3d [1093] at 1095-96 [(9th Cir. 1996)] (noting that once the commercial nature of the activity is established, the courts must consider the aggregate effect of the activity on the commercial market).

Wall, 92 F.3d at 1450-51 n. 14 (emphasis added). *See also*, *Lopez*, 514 U.S. at , 115 S. Ct. at 1629 ("where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.") (emphasis in original).

Moreover, the Court is not convinced by defendant's argument that the "evidence will not support any theory that the video poker business at issue . . . engaged in any business which had even a minimal effect on interstate commerce." Record Doc. No. 65 at 17. If the government produces the evidence that it says it will, that evidence would show that defendant's alleged gambling business had significant interstate commercial aspects to it. Specifically, the government states that the evidence will show that: 1) the video poker machines essential to the operation were manufactured in another state; 2) the negotiations for the purchase of property for, and the

construction of, future video poker locations involved interstate commerce; 3) the truck stop facility was required to have monthly fuel sales in an amount that implicates interstate commerce both as to the customers purchasing the fuel and the supplier providing the fuel; and 4) the truck stop facility was required to have a liquor license and restaurant facilities sufficient to handle a minimum of 50 persons and had agreements with national food suppliers to meet these requirements.

Accordingly, defendant Goodson's challenges to Section 1955 are rejected.

E. The Validity of Section 1956 After *Lopez*

Defendant Fred Goodson concedes that the federal money laundering statute, 18 U.S.C. § 1956, is different from both the GFSZA and from Section 1955 in that by its express terms it limits application of the statute to certain transactions that affect interstate or foreign commerce "in any way or degree" or involve the use of a financial institution which is engaged in or affects interstate or foreign commerce "in any way or degree." 18 U.S.C. § 1956(4)(A) and (B). Goodson submits that the presence of such a tenuous jurisdictional link between the offense conduct and interstate commerce is insufficient to meet the requirements of *Lopez*. The Court disagrees.

As discussed above, the Fifth Circuit's post-*Lopez* jurisprudence demonstrates the critical significance of a statutorily required jurisdictional nexus to the statute's validity vel non under the Commerce Clause. *See Rawls*, 85 F.3d at 242 ("[central to the Court's holding in *Lopez* was the fact that § 922(q) contained 'no jurisdictional element which would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce.'"). Further, the Supreme Court has held that the presence of even a tenuous

jurisdictional nexus is to be read to invoke the full extent of Congress's Commerce Clause power. *See Russell v. United States*, 471 U.S. 858, 859, 105 S. Ct. 2455, 2456, 85 L. Ed. 2d 829 (1985). Thus, the Fifth Circuit, pre-*Lopez*, concluded that the minimal jurisdictional nexus requirement of Section 1956 was intended by Congress to invoke the full extent of Congress's power under the Commerce Clause. *See Gallo*, 927 F.2d at 822-23. The Court stated that:

> Section 1956 applies to conduct that 'in any way or degree affects interstate or foreign commerce.' 18 U.S.C. § 1956(c)(4). The legislative history of the Act indicates that this phrase was derived from the Hobbs Act, 18 U.S.C. § 1951, 'and is intended to reflect the full exercise of Congress's power under the Commerce Clause.' S. Rep. No. 433, 99th Cong. 2d Sess. 13 (1986).

Id.

Other circuits have come to the same conclusion. *See, e.g., United States v. Petty*, 972 F.2d 71, 74 (4th Cir. 1992) ("We . . . hold that, in enacting § 1956, Congress intended to exercise the full legislative power conferred by the Commerce Clause.) Since Section 1956 is therefore to be interpreted to invoke the full extent of Congress' Commerce Clause powers, whatever they may be, the issue remains whether the defendant's alleged behavior had the requisite connection to interstate commerce for it to be constitutionally regulated under this statute. The Court finds that it had the requisite connection.

Defendant Fred Goodson is charged with five counts (i.e., Counts 8 - 12) of money laundering in violation of Section 1956. All of those counts involve one or more National Banks. Every financial institution involved is federally insured. *See United States v. Green*, 964 F.2d 365, 375 (5th Cir. 1992) ("At

oral argument [defendant's] counsel admitted he had never heard of a bank that did not affect interstate commerce in some way; NOR HAVE WE."). Two of the transactions (i.e., Counts 9 and 11) involve institutions in two different states: Louisiana and Mississippi. All of the counts involve the proceeds of an allegedly illegal gambling business, which, in this Court's view, implicated interstate commerce.

Finally, the Court notes that Section 1956 is also constitutional under Congress's power to collect taxes. *See United States v. Jensen*, 69 F.3d 906, 910 n. 5 (8th Cir. 1995) ("In enacting the money laundering statute, Congress exercised its authority not only under the Commerce Clause, but also under its authority to collect taxes, duties, imposts and excises. The reasoning of *Lopez* does not apply."). The statute itself makes it illegal to knowingly "conduct or attempt[] to conduct . . . a financial transaction which in fact involves the proceeds of specified unlawful activity--(A)(I) with the intent to promote the carrying on of specified unlawful activity; or (ii) *with intent to engage in conduct constituting a violation of section 7201 of the Internal Revenue Code of 1986*. . . ." 18 U.S.C. § 1956 (emphasis added). The invocation of Section 7201 of the Internal Revenue Code is especially pertinent to this case, because all of the money laundering counts allegedly involve either conduct constituting an alleged violation of the Internal Revenue Code of 1986 (counts 8 and 9) or movement of the proceeds of those alleged Internal Revenue Code violations (counts 10 through 12). Congress is doubtlessly empowered to regulate such activity under both the Necessary and Proper Clause and Congress's taxing powers. Thus, while some money laundering cases might not implicate the part of the statute passed pursuant to Congress' taxing powers, this case clearly does.

Accordingly, Goodson's motion to dismiss Counts 8 through 12 of the indictment on the grounds that Section 1956 is both facially unconstitutional and unconstitutional as applied to this case is denied.

III. Defendant Fred Goodson's Motion to Dismiss All Mail Fraud Counts and All Racketeering Acts Predicated on Mail Fraud

Defendant Fred Goodson moves this Court to dismiss Counts 3, 4, 5, and 6 and Racketeering Acts 1a, 1b, 1c, and 1d from the Indictment, all of which allege violations of 18 U.S.C. § 1341, the federal mail fraud statute. At issue is a question that has yet to be decided by the Fifth Circuit: whether video draw poker licenses constitute the "money or property" required to support a mail fraud conviction. After a consideration of the arguments presented by both parties and the relevant law, the Court finds that video poker licenses constitute property for purposes of the mail fraud statute. Accordingly, the Court denies defendant Fred Goodson's motion to dismiss the counts and racketeering acts that are predicated on mail fraud.

A. Background

The federal mail fraud statute, 18 U.S.C. § 1341, provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining *money or property* by means of false or fraudulent pretenses, representations, or promises . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (emphasis added).

Indictment counts 3 through 6 and racketeering Acts 1a, 1b, 1c, and 1d charge defendant Fred Goodson, and others,[5] with:

> knowingly and willfully devising and intending to devise a scheme and artifice to defraud, and to obtain property by means of false and fraudulent pretenses and representations; that is, to defraud the State of Louisiana and its citizens by fraudulently obtaining and renewing, through the submission of false and incomplete information, state licenses to operate video poker sites for Truck Stop Gaming, Ltd.

Superseding Indictment at 26.

Defendant Fred Goodson argues that these charges must be dismissed because state licenses to operate video poker sites do not constitute "property" for purposes of 18 U.S.C. § 1341. Defendant relies heavily upon the Supreme Court decisions in *McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987), and *Carpenter v. United States*, 484 U.S. 19, 108 S. Ct. 316, 98 L. Ed. 2d 275 (1987).

B. Defining Property Under the Mail Fraud Statute

In *McNally*, the former chairman of the Kentucky Democratic Party orchestrated a scheme that steered state workman's compensation insurance contracts to an agency that agreed to share commissions with other insurance agencies specified by the former chairman. The trial court's jury instruction allowed for a conviction in the event that the jury found a scheme to defraud Kentucky and its citizens of the

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[5] Counts 3 through 6 charge defendants Carl Cleveland, Fred Goodson, and Maria Goodson with mail fraud. Counts 5 and 6 also charge defendant Joe Morgan with mail fraud. Racketeering acts 1a, 1b, 1c, and 1d incorporate the acts alleged in counts 3, 4, 5, and 6, respectively.

right to have the state's business conducted "honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud." *McNally*, 483 U.S. at 355 n. 4, 107 S. Ct. at 2878 n. 4. After a mail fraud conviction based on this instruction, the Supreme Court reversed, rejecting the application of the mail fraud statute to "schemes to defraud citizens of their intangible rights to honest and impartial government." *Id.*, 483 U.S. at 356, 107 S. Ct. at 2879. The Court held that the mail fraud "statute is limited in scope to the protection of property rights." *Id.*, 483 U.S. at 360, 107 S. Ct. at 2882. The Court concluded that "any benefit which the Government derives from the statute must be limited to the Government's interests as a property holder." *Id.*, U.S. at 358 n. 8, 107 S. Ct. at 2881 n. 8.

After *McNally*, the Supreme Court held in *Carpenter v. United States* that Section 1341 encompasses intangible property as well as tangible property. *Carpenter*, 484 U.S. at 25, 108 S. Ct. at 320. Specifically, the Court found that a scheme to take the Wall Street Journal's publication schedule and the contents of its "Heard on the Street" column constituted a scheme to take "property" under the mail fraud statute. *Id.*

Congress also acted shortly after the *McNally* decision to lessen its impact by enacting 18 U.S.C. § 1346, which extends the reach of the mail and wire fraud statutes to include "any scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. Defendant argues that the video poker licenses do not satisfy the mail fraud statute's property requirement under *McNally* and *Carpenter*, and that Section 1346 does not alter this result.[6] The Court finds that

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[6] It is true that the government does not rely on Section 1346 as a basis for criminal liability in the indictment, since it did not charge defendant with depriving another of the intangible right to honest services.

neither *McNally* nor *Carpenter* compels that conclusion because neither of them has anything to say on the specific issue of whether licenses constitute property.

Defendant also relies on a number of circuit court decisions that have held that state-issued licenses of various sorts are not property for purposes of Section 1341. *See United States v. Novod*, 927 F.2d 726, 728 (2d Cir. 1991) (state dumping permit); *United States v. Schwartz*, 924 F.2d 410, 417-18 (2d Cir. 1991) (arms export license); *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (school bus operator permit); *United States v. Kato*, 878 F.2d 267, 268-69 (9th Cir. 1989) (pilot license); *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989) (cab driver license); *United States v. Murphy*, 836 F.2d 248, 253-54 (6th Cir.), *cert. denied*, 488 U.S. 924, 109 S. Ct. 307, 102 L. Ed. 2d 325 (1988) (bingo license); *United States v. Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988) (gambling license). These decisions all state that a license achieves property status only when it is in the hands of the licensee--i.e., that a license is without value to the state and therefo[illegible] is not property before it is issued. Moreover, each of these decisions finds that in issuing the licenses, the state acted as a regulator not a property owner. For example, in the *Schwartz* decision, the Second Circuit found that an arms export license did not constitute property for purposes of the mail fraud statute because the license was simply a means of regulating the private use of private property. The Court stated:

> The government's interest in issuing its licenses ancillary to its regulatory program is no different than its interests in propounding and enforcing its other

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The Court notes, however, that Congress' action in passing Section 1346 demonstrates an intent to broaden the scope of what is considered property for purposes of the mail fraud statute.

> regulations with broad based applications that do not include the issuance of licenses. Whether it chooses to use licenses or blanket rules, the government's purpose is to control the private use of private property. Thus, a regulatory license is nothing more than a formal embodiment of 'the necessary government approval.'

Schwartz, 924 F.2d at 417 (internal citation omitted). *See also Toulabi*, 875 F.2d at 125. ("From the government's perspective, however, the [taxi cab] license is a promise not to interfere rather than a sliver of property. . .. [This] is a regulatory rather than property interest.").

In response to the defendant's arguments, the Government points to three decisions--in the First Circuit, the Third Circuit, and the Eastern District of Louisiana--which hold that licenses constitute property for purposes of the mail fraud statute. *See United States v. Bucuvalas*, 970 F.2d 937 (1st Cir. 1992); *United States v. Martinez*, 905 F.2d 709, 712-14 (3d Cir. 1990); *United States v. Carollo*, 1995 U.S. Dist. LEXIS 12442, 1995 WL 505461 (E.D. La. Aug. 22, 1995) (video poker licenses in Louisiana) (appeal pending). In *Martinez*, the Third Circuit found medical licenses to be property for purposes of the mail fraud statute. The Court rejected the argument that there is no loss of property by the state when it issues a license to someone in reliance on fraudulent information. The Court found no reason to draw an "esoteric distinction between an unissued and an issued license." *Martinez*, 905 F.2d at 715. The Court reasoned:

> This argument depends on the questionable statutory construction that someone who fraudulently acquires property that has great value once acquired, has not violated the mail fraud statute if the item acquired had no, or negligible, value in the hands of the victim.

> Nothing in the statutory language supports that theory. The statute, which proscribes 'obtaining money or property,' is broad enough to cover a scheme to defraud a victim of something that takes on value only in the hands of the acquirer as well as a scheme to defraud a victim of property valuable to the victim but valueless to the acquirer.

Id. at 713.

In *Bucuvalas*, the First Circuit likewise held that an entertainment and liquor license was property for the purposes of Section 1341. It was also unimpressed with the argument that the City's interest in the unissued licenses was not property:

> [G]iven the Court's expansive interpretation of the term 'property' in *Carpenter* . . .we believe the municipal government's interest in these alcoholic beverage and entertainment licenses was in the nature of a 'property' interest within the meaning of *McNally* and *Carpenter*. In its broadest sense, a 'property' interest resides in the holder of any of the elements comprising the 'bundle of rights' essential to the use or disposition of tangible property or to the exercise or alienation of an intangible right. For instance, in *Carpenter* the defendant held a possessory interest in the wrongfully-disposed confidential information, while the Wall Street Journal retained the right to control the manner of its use, dissemination, and alienation. Similarly, the City of Boston had the right to control the issuance of these licenses, in order to assure their issuance to deserving licensees only.

Bucuvalas, 970 F.2d at 945 (internal citations omitted). The Court went on to add that even if the licenses did not become

property until they were issued, the city retained a right to control their alienation by the licensees, which was a property right, the deprivation of which could support a conviction for mail fraud. *Id.*

This Court agrees with the First and Third Circuit's conclusion that licenses constitute property even before they are issued. A distinction between an unissued and issued license belongs in the realm of metaphysics, not in a common sense application of the law. As one district court has held, "[t]o hold, as some courts have, that such valuable property vanishes when held in the hands of the issuer strikes the Court as preposterous." *United States v. Berg*, 710 F. Supp. 438, 444 (E.D.N.Y. 1989) (internal citation omitted). The Court finds no reason to make distinctions of such pointless subtlety. The Court finds that video poker licenses are property and the challenged scheme deprived the state of its right to dispose of its property.

Further, although the Fifth Circuit has yet to rule on the matter, Fifth Circuit law strongly suggests that the strained distinction between issued and unissued licenses should be rejected. In *United States v. Loney*, 959 F.2d 1332 (5th Cir. 1992), for example, the Court rejected an argument from the defendant that frequent flyer coupons do not constitute property for purposes of the federal fraud statutes. The Court in *Loney* rejected the defendant's argument, noting that "we construe 'property' in a broad sense for purposes of the federal fraud statutes." *Id.* at 1336. Noting that the *McNally* Court defined property as "things of value," *see McNally*, 483 U.S. at 358, 107 S. Ct. at 2881, the court concluded that frequent flyer coupons were clearly "something of value" because they could be used to obtain free flight tickets. *Id.* The court remarked that "[i]f such coupons did not represent something of value, one

wonders why [the defendant] went to such trouble to obtain and sell them." *Id.* at 1336 n.8.

The defendant's argument that video poker licenses are not property in the hands of the State because they only take on value after they are issued applies equally in the context of frequent flyer coupons. Frequent flyer coupons generally have little to no value to the issuer and arguably take on value only after they are issued to a customer of the airlines. While the airlines cannot use the coupons themselves, the Fifth Circuit still found them to be property for purposes of the federal fraud statutes because they represent a "bundle of rights" that the airlines can dispose of as they see fit--the disposal of which significantly affects the airline financially. This Court finds no principled reason for making a distinction between issued and unissued licenses, especially when the Fifth Circuit has refused to make a distinction between issued and unissued frequent flyer coupons. Accordingly, Loney provides another rationale for rejecting defendant's argument.

Moreover, as one court has noted, "[t]he view . . . that licenses are property in the hands of the licensees, but never in the hands of the government represents an inversion of historical fact." *United States v. Turoff*, 701 F. Supp. 981, 988 (E.D.N.Y. 1988). As noted in a seminal article by Professor Charles Reich on the history of property rights, licenses and other forms of government largess were traditionally considered to be property that belonged to the state before it was given to private citizens:

> The chief obstacle to the creation of private rights in [government] largess [e.g., licenses, welfare benefits, services, contracts and franchises] has been the fact that it is originally public property, comes from the state, and made be withheld completely.

Charles Reich, The New Property, 73 *Yale L.J.* 733, 778 (1964). *See also Martinez*, 905 F.2d at 714; *Turoff*, 701 F. Supp. at 989-90 (Salutary fact that in modern times courts recognize property rights in licenses need not blind us to the fact that licenses originate in the state and are public property in the first instance.).

Furthermore, the Court finds that the facts of this case distinguish it from those cited by the defendant. As the government points out, the cases cited by the defendant focus on the State's lack of property interest in licenses solely involving the Government's exercise of a regulatory function. *See, e.g., Schwartz*, 924 F.2d at 417 ("The government's interest in issuing its licenses ancillary to its regulatory program is no different than its interests in propounding and enforcing its other regulations with broad based applications that do not include the issuance of licenses."); *Toulabi*, 875 F.2d at 125 ("All the license signifies from the City's perspective is that the driver met the substantive criteria for the profession . . . nothing more . . . . [This] is a regulatory rather than property interest."). Video poker is different, however, in that the State of Louisiana is more than just a mere regulator of the video poker industry and has much more of a direct financial interest in the video poker licenses than the government entities did in the cases cited by the defendant.

It is noteworthy that until recently, the business of video poker was illegal in Louisiana. One of the main reasons for the recent legalization of video poker was that it was considered an ongoing source of revenue for the State. Accordingly, Louisiana has set strict requirements to insure that the State receives its pro rata share of video poker receipts. Under the provisions of La. R.S. 33: 4862.11(D)(2), for example, there is a 22.5% mandatory "franchise payment" of net video poker revenues that must be paid by all licensees into the "state

treasury."[7] The State protects its interest in these revenues by 1) connecting each operating video poker machine to a central State computer in Baton Rouge, which records all of the money taken in and paid out in winnings; 2) issuing licenses only to people who meet certain qualifications; and 3) making such licenses nontransferable. The Court finds that, in light of the State's continued control over and considerable financial stake in the video poker industry, video poker licenses under Louisiana law are significantly different than the taxi cab driver's licenses, pilot licenses, state dumping licenses, bingo licenses, and arms trade licenses that were at issue in the cases cited by the defendant.

The case of *Borre v. United States*, 940 F.2d 215 (7th Cir. 1991), is instructive. In *Borre*, the Seventh Circuit held that the government had a property interest in a cable television franchise in spite of the Seventh Circuit's earlier holding in *Toulabi*, 875 F.2d at 125, that taxi licenses do not constitute government property. In distinguishing a cable television franchise from the taxi licenses in *Toulabi*, the *Borre* court concluded that "a cable television franchise represents far more than a mere 'promise not to interfere' by the government." *Borre*, 940 F.2d at 221 (quoting *Toulabi*, 875 F.2d at 125). The same could be said of the video poker licenses involved in this case.

As the government points out, under Louisiana law, when the state awards a video poker license, it is functionally

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[7] The Court notes that the Louisiana Legislature's use of the term "franchise" is significant in light of Louisiana jurisprudence. Under Louisiana law, a franchise conferred by a government subdivision upon a private entity has been termed "a valuable property right." *Washington-St. Tammany Electric Cooperative, Inc. v. St. Tammany Parish Police Jury*, 612 So. 2d 773, 777 (La. App. 1st Cir. 1992), *writ denied*, 614 So. 2d 86 (1993).

equivalent to awarding a franchise from which the State receives a significant percentage of revenue and over which it continues to exercise a great deal of control. In light of the State's continued financial interest in each video poker license it issues, these video poker licenses are substantially different from regulatory licenses and should be considered property because the state acts more as a property owner than as a "mere regulator."

In arguing that the state has no property interest in video poker licenses, the defendant also relies on La. R.S. 22:4862.1 (D), which provides that:

> Any [video poker] license applied for, granted, or issued under the provisions of this Part is a pure and absolute privilege .... Any license issued or renewed under the provisions of this Part is not property or a protected interest under the constitutions of either the United States or the state of Louisiana. La. R.S. 22:4862.1 (D).

The Court does not agree with the defendant that this statute mandates a finding that the licenses are not property for purposes of the mail fraud statute. First, the Court notes that when determining whether something constitutes property for purposes of the federal fraud statutes, courts must look not only to state statutes, but also to "traditional property law." *See Martinez*, 905 F.2d at 713; *Carollo*, 1995 U.S. Dist. LEXIS 12441, 1995 WL 505461 at *2. Under traditional property law, owners of licenses are generally considered to have a protective property interest. *Id.* (citing *Mackey v. Montrym*, 443 U.S. 1, 10, 99 S. Ct. 2612, 2617, 61 L. Ed. 2d 321 (1979); *Beauchamp v. De Abadia*, 779 F.2d 773, 775 (1st Cir. 1985); *Keney v. Derbyshire*, 718 F.2d 352, 354 (10th Cir. 1983); *Kudish v. Bradley*, 698 F.2d 59, 61 (1st Cir. 1983)); *cf. In re National Cattle Congress, Inc.*, 179 Bankr. 588, 593 (N.D.

Iowa 1995) (dog racing license constitutes property of estate in bankruptcy), *appealed on other grounds*, 91 F.3d 1113 (8th Cir. 1996); *In re Crescent City Capital Development Corp.*, No. 95-12735-B, 95-12736-B at 7-11 (E.D. La. Oct. 2, 1995) (riverboat gaming license constitutes property of estate in bankruptcy).

Moreover, the Court notes that the Supreme Court and the Fifth Circuit have both stated that property is to be interpreted broadly for purposes of the federal fraud statutes. *McNally*, 483 U.S. at 356, 107 S. Ct. at 2880 (citing *Durland v. United States*, 161 U.S. 306, 16 S. Ct. 508, 40 L. Ed. 709 (1896)); *Loney*, 959 F.2d at 1335-36.[8] That the Louisiana State Legislature has decided to deprive video poker licensees of a property interest in the context of 22:4862.1(D) does not mean that federal courts must apply that deprivation in all contexts. *Cf. Loney*, 959 F.2d at 1335-36 (recognizing that courts can construe things as property in one context but as not property in another). Congress could have expressly made the definition of property in Section 1341 completely dependent on state law definitions of property, but it chose not to do so. Consequently, the Court must look to traditional property law as well as state law in making its determination. Traditional property law clearly suggests that video poker licenses constitute property

In any event, this Court concludes that the existence of La. R.S. 22:4862.1(D), if anything, hurts the defendant's position that the State has no property interest in the video poker licenses in that the statute is designed to limit the property rights of the licensees, so as to give the State a stronger interest

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[8] As noted above, Congress, in passing 18 U.S.C. § 1346, also expressed its desire that courts should interpret property broadly for purposes of the federal fraud statutes. *See* note 6, *supra*, and accompanying text

in the licenses even after they are issued. In attempting to limit the property rights of video poker licensees through La. R.S. 22:4862.1(D), the State has made clear its intent to have video poker licensees act as if they were franchisees, thus protecting the State's significant financial interest in the industry. The statute reflects that the State wanted to keep to itself as much of an interest in the licenses as possible.

Finally, the Court rejects defendant Goodson's argument that federalism concerns are implicated by this motion. In short, since the Court finds that the video poker licenses in question are property for the purposes of Section 1341, the Court concludes that this is not "an unwarranted intrusion by the federal government into the conduct of state affairs," as defendant describes it. Record Doc. No. 66 at 16. Nor are comity concerns significantly implicated here because this interpretation of the mail fraud statute does not criminalize conduct that would otherwise be legal under state law. *See* La. R.S. 27:309(A) (providing criminal penalties for false statements intentionally made on video poker license applications).

The Court finds that the mail fraud charges in the superseding indictment are not facially invalid, as defendant suggests, and denies defendant Fred Goodson's motion to dismiss all mail fraud counts and to dismiss all racketeering acts alleging mail fraud violations. Accordingly,

IT IS ORDERED that defendant Goodson's motion to dismiss racketeering acts 1a, 1b, 1c, 1d and Counts 3, 4, 5, and 7 is hereby DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.97-31057, No. 98-30471

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross-Appellant,

v.

LARRY S. BANKSTON; MARIA F. GOODSON,
Defendants-Appellants-Cross-Appellees,

CARL W. CLEVELAND; FRED H. GOODSON,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARIA F. GOODSON,
Defendant-Appellant.

ALEXANDROS F. GOODSON; TRUCK
STOP GAMING LTD.,
Intervenors -Appellants.

September 2, 1999, Filed
Charles R. Fulbruge, III, Clerk

Appeals from the United States District Court for the
Eastern District of Louisiana, New Orleans

ON PETITIONS FOR REHEARING
AND REHEARING EN BANC

Before KING, Chief Judge, and REAVLEY and BENAVIDES, Circuit Judges.

PER CURIAM :

(√) The Petitions for Rehearing on behalf of Larry Bankston, Fred H Goodson and Carl W Cleveland are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc on behalf of Fred H Goodson, Carl W Cleveland and Maria F Goodson is also DENIED.

( ) The Petitions for Rehearing on behalf of Larry Bankston, Fred H Goodson and Carl W Cleveland are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R..APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc on behalf of Fred H Goodson, Carl W Cleveland and Maria F Goodson is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsidcrations of this cause en banc, and a majority of the judges in active service not having voted in favor, the Petition for Rehearing En Banc on behalf of Fred H Goodson, Carl W Cleveland and Maria F Goodson is DENIED.

ENTERED FOR THE COURT:

/s/ [signature illegible]
United States Circuit Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.97-31057

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross-Appellant,

v.

LARRY S. BANKSTON; MARIA F. GOODSON,
Defendants-Appellants-Cross-Appellees,

CARL W. CLEVELAND; FRED H. GOODSON,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARIA F. GOODSON,
Defendant-Appellant.

ALEXANDROS F. GOODSON; TRUCK
STOP GAMING LTD.,
Intervenors -Appellants.

July 13, 1999, Filed
Charles R. Fulbruge, III, Clerk

Appeals from the United States District Court for the
Eastern District of Louisiana, New Orleans

ORDER:

IT IS ORDERED that the motion of appellants, Carl W. Cleveland and Fred H. Goodson, for leave to file a joint supplemental brief, not exceeding 2,500 words, is DENIED.

IT IS FURTHER ORDERED that the request of appellants for leave to file a reply to any response that might be filed by the government, is DISMISSED AS MOOT.

/s/ Charles R. Fulbruge III
Charles R. Fulbruge III
Clerk of the Court

Supreme Court, U.S.
FILED
FEB 9 - 2000
CLERK

(2) (2)

Nos. 99-804 and 99-939

In the Supreme Court of the United States

CARL W. CLEVELAND, PETITIONER

v.

UNITED STATES OF AMERICA

FRED H. GOODSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether video poker licenses issued by the State of Louisiana constitute "property" within the meaning of the mail fraud statute, 18 U.S.C. 1341.

2. Whether the district court committed plain error in failing to instruct the jury on the materiality element of a mail fraud offense.

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In the Supreme Court of the United States

No. 99-804

CARL W. CLEVELAND, PETITIONER

v.

UNITED STATES OF AMERICA

No. 99-939

FRED H. GOODSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a[1]) is reported at 182 F.3d 296. The opinion of the district court (Pet. App. 52a-86a) is reported at 951 F. Supp. 1249.

[1] References to "Pet." and "Pet. App." are to No. 99-804 unless otherwise specified.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1999. The petition for rehearing was denied on September 2, 1999. The petition for a writ of certiorari in No. 99-804 was filed on November 9, 1999. The petition for a writ of certiorari in No. 99-939 was filed on December 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners Cleveland and Goodson were convicted of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c); conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); and two counts of mail fraud, in violation of 18 U.S.C. 1341. In addition, petitioner Cleveland was convicted of four counts of money laundering, in violation of 18 U.S.C. 1956; tax conspiracy, in violation of 18 U.S.C. 371; and filing a false tax return, in violation of 26 U.S.C. 7206(2). Petitioner Goodson was convicted of five counts of money laundering and three counts of the use of interstate communications in aid of state bribery, in violation of 18 U.S.C. 1952. Each petitioner was sentenced to 121 months' imprisonment. In addition, the district court ordered the forfeiture of their interests in two business entities. The court of appeals affirmed. Pet. App. 1a-44a.

1. The evidence at trial showed that, in early 1992, petitioner Fred Goodson and his family formed TSG, Ltd., and its corporate partner, TSG, Inc., in order to participate in the video poker business at their truck

stop in Slidell, Louisiana. With the assistance of petitioner Carl Cleveland and petitioner Goodson's law firm, Cleveland, Barrios, Kingsdorf & Casteix, the Goodsons prepared and submitted to the Louisiana State Police applications for a gaming license for TSG, Ltd. The applications required partnerships seeking gaming licenses to identify their partners; to submit personal financial statements for all partners; to affirm that the listed partners were the sole beneficial owners; and to affirm that no partner had an arrangement to hold his interest as "an agent, nominee or otherwise," or a present intention to transfer any interest in the partnership at a future time. Pet. App. 2a-3a.

The initial application submitted on behalf of TSG, Ltd., identified Maria and Alex Goodson, Fred Goodson's adult children, as the limited partners and TSG, Inc., as the general partner. The application listed no other persons or entities as having any ownership interest in TSG, Ltd. TSG, Ltd. submitted renewal applications in 1993, 1994, and 1995 that also listed no additional ownership interests. In fact, at all times the true owners of the company were petitioners Goodson and Cleveland. The two concealed their ownership interest from state regulators in order to avoid the probing inquiry of the State's suitability assessment. Pet. App. 5a-6a.

2. The mail fraud statute, 18 U.S.C. 1341, makes it a crime to use the mail in connection with "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The mail fraud counts of the indictment charged that the defendants had devised a scheme to deprive the State of Louisiana and its citizens of "property" by "fraudulently obtaining and renewing, through the submission of false and in-

complete information, state licenses to operate video poker sites." Pet. App. 74a.

Before trial, petitioner Cleveland adopted a motion filed by his co-defendant, petitioner Goodson, to dismiss the mail fraud counts on the ground that state licenses to operate video poker sites do not constitute "property" within the meaning of Section 1341. Petitioners argued, among other things, that such licenses do not become property until they are issued, because they have no value to the State. Accordingly, in petitioners' view, an attempt to acquire a state license through false representations does not implicate any state property interest. The district court rejected that contention. Pet. App. 73a-86a.

3. On appeal, petitioners renewed their contention that state licenses do not constitute property for purposes of the mail fraud statute. Relying on *United States* v. *Salvatore*, 110 F.3d 1131 (5th Cir.), cert. denied, 522 U.S. 981 (1997), the court of appeals affirmed the ruling of the district court. See Pet. App. 19a. In *Salvatore*, the court, applying *McNally* v. *United States*, 483 U.S. 350 (1987), and *Carpenter* v. *United States*, 484 U.S. 19 (1987), reasoned that "in considering whether video poker licenses constitute property under the mail fraud statute, we must determine whether Louisiana has an interest in the licenses as a property holder." 110 F.3d at 1139. The court held that Louisiana had more than just a regulatory interest in the video poker licenses, thereby justifying application of the mail fraud statute. *Ibid.*

The *Salvatore* court first reasoned that the concept of property involves a legal "bundle of rights," including the rights to "possess, use, and dispose" of a particular article. 110 F.3d at 1140. As applied to licenses, the court found that that "bundle" includes the right to

control their issuance. The court also concluded that Louisiana had "zealously sought to protect its right to control the [video poker] licenses" at issue here. *Ibid.* The court went on to reject a distinction between issued and unissued licenses, finding that unissued video poker licenses had value to the State. *Id.* at 1141. The court further determined that the State has a property, and not merely a regulatory, interest in the video poker licenses, because the State had "a direct and significant [continuing] financial stake * * * as issuer of the licenses" in the video poker industry. *Id.* at 1142.

The court of appeals concluded that the Louisiana statutory scheme, by expressly stating a limitation on the property interests of licensees, evinces an intent that the State is to maintain its control and ownership of video poker licenses. 110 F.3d at 1142 (discussing La. Rev. Stat. Ann § 27:301(D) (West Supp. 1997)). Similarly, after applying traditional property law concepts, the court found that the licenses constituted property. *Id.* at 1142-1143.

4. Following oral argument on petitioners' appeal, petitioners sought leave to file a supplemental brief in light of this Court's intervening decision in *Neder* v. *United States*, 119 S. Ct. 1827 (1999), which held that the materiality of the falsehoods used in a scheme to defraud is an element of a mail fraud offense, *id.* at 1841. Petitioners argued that the district court committed plain error in failing to give a materiality instruction. The government opposed petitioners' motion, arguing that supplemental briefing was unnecessary because the issue had been waived, the district court had in any event included materiality language in the jury charge, and the defendants in fact had argued materiality to the jury. The court of appeals denied the

motion and did not address the issue in its opinion issued eight days later.

ARGUMENT

1. Petitioner Cleveland contends (Pet. 9-21) that the video poker licenses do not constitute "property" within the meaning of the mail fraud statute, 18 U.S.C. 1341. Petitioner Goodson (99-939 Pet. 11) adopts petitioner Cleveland's argument.[2] The courts below correctly rejected that contention, and it does not warrant further review.

a. In *Carpenter* v. *United States*, 484 U.S. 19 (1987), the court affirmed the wire fraud conviction of a *Wall Street Journal* columnist who had traded stock before publication of his newspaper column based on his knowledge of what the column would say. The Court made clear that the intangible nature of the misappropriated confidential information did not make the information any less a form of "property" within the mail fraud statute. *Id.* at 25-27. The Court explained

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[2] The court of appeals stated that "Maria Goodson and Attorney Cleveland assert that a Louisiana video poker license is not 'property' for purposes of the mail fraud statute." Pet. App. 19a. Petitioner Fred Goodson unsuccessfully requested that the court of appeals modify its decision to reflect that he too had raised the property/license issue on appeal from the district court judgment. The government opposed that motion on the ground that petitioner Goodson had not properly developed that argument under Federal Rule of Appellate Procedure 28(i) and had improperly attempted to adopt petitioner Cleveland's argument. The court of appeals denied petitioner Goodson's motion and did not modify its decision. Thus, in the court below, petitioner Goodson waived his opportunity to contend that the district court had erred in rejecting petitioner Cleveland's argument that Louisiana video poker licenses are not "property" within the ambit of the mail fraud offense.

that the *Journal* had been deprived of its property right to make exclusive use of its confidential information, even though the defendants had not totally deprived the *Journal* of its possession of the information or its ability to publish it. *Id.* at 26-27.

Here, the State of Louisiana had a property interest in the unissued video poker licenses similar to the *Wall Street Journal*'s interest in maintaining the confidentiality of its business information. In *Carpenter*, the Court held that the *Journal*'s exclusive right to control its confidential information was a property interest. 484 U.S. at 26. By the same token, in this case, "what the [State] (and derivatively its people) lost was the right to keep its [video poker] licenses to itself and to bestow them on persons who had fairly earned them." *United States* v. *Martinez*, 905 F.2d 709, 714 (3d Cir.), cert. denied, 498 U.S. 1017 (1990). The State also lost the right to control who handled a substantial, continuing source of earnings under the licenses. The court of appeals thus correctly found that the licenses had continuing value to the State.

b. Petitioner Cleveland contends (Pet. 10-13) that the instant decision conflicts with holdings of other courts of appeals that particular licenses, especially unissued licenses, did not constitute property under the mail fraud statute. Although the Fifth Circuit in *Salvatore* criticized reasoning in some of those cases that an unissued license cannot be property even though an issued license can be, 110 F.3d at 1140-1141, it ultimately explained that "video poker licenses are different than other types of licenses," *id.* at 1142 n.2, because of the "character of the licenses themselves," *id.* at 1141. Because of the distinct characteristics of Louisiana's video poker license, the holding here is distinguishable from decisions of other courts of appeals

that have reversed mail fraud convictions on the ground that various types of licenses were not property. See, *e.g.*, *United States* v. *Schwartz*, 924 F.2d 410, 417-418 (2d Cir. 1991) (arms export license); *United States* v. *Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (school bus operator's permit), cert. denied, 500 U.S. 921 (1991); *United States* v. *Kato*, 878 F.2d 267, 268-269 (9th Cir. 1989) (private pilot's license); *Toulabi* v. *United States*, 875 F.2d 122, 125 (7th Cir. 1989) (taxi driver's license); *United States* v. *Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988) (gambling license); *United States* v. *Murphy*, 836 F.2d 248, 254 (6th Cir.) (bingo license), cert. denied, 488 U.S. 924 (1988).

As the *Salvatore* court explained, those cases rest on the theory that, in the manner in which particular licenses operated in the States that had issued them, the licenses did not represent property to the issuing governments. Rather, under the reasoning of those cases, "the issuance of a license is nothing more than a physical manifestation of the government's intent to regulate." 110 F.3d at 1141. The *Salvatore* court "agree[d], as an initial matter, that the right to regulate a particular industry does not *a fortiori* give the regulator a property interest in licenses signifying the government's regulation." *Ibid.* With respect to video poker licenses, however, the State "has a direct and significant financial stake in its role as issuer of the licenses" because it receives an "up-front fee" for the license and a significant percentage of net revenues as a franchise fee. *Id.* at 1142. The *Salvatore* court noted that Louisiana fully expected to receive continuing funds from the video poker license (22.5% of the licensee's net revenues), such that the license "evinces the State's intent to participate in the industry." *Ibid.* The entitlement to control the sources of future re-

venue gave the State a continuing property interest in the license.

The cases on which petitioner Cleveland (Pet. 11-13) relies involve licenses that lack that revenue-producing feature. See *United States* v. *Shotts*, 145 F.3d 1289, 1294-1295 (11th Cir. 1998) (no indication of continuing government financial stake in bail bond license), cert. denied, 119 S. Ct. 1111 (1999); *United States* v. *Paccione*, 949 F.2d 1183, 1186-1187 (2d Cir. 1991) (same for medical waste dumping permit), cert. denied, 505 U.S. 1220 (1992); *Granberry*, 908 F.2d at 280 (same for bus license); *Kato*, 879 F.2d at 269 (same for pilot's license); *Toulabi*, 875 F.2d at 126 (same for taxi driver license); *Dadanian*, 856 F.2d at 1392 (same for poker club license); *Murphy*, 836 F.2d at 250-254 (same for bingo license). Accordingly, none of those cases conflicts with the holding that Louisiana video poker licenses represent a government property right protected by the mail fraud statute.[3]

2. Relying on *Neder* v. *United States*, 119 S. Ct. 1827 (1999), petitioners contend (Pet. 21-25; 99-939 Pet. 10-11) that the district court committed plain error in failing to instruct the jury that a falsehood charged in a mail fraud offense must be found to be material.[4] The court of appeals correctly declined to address that

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[3] We note that the petition for a writ of certiorari in *Salvatore*, which this Court denied, 522 U.S. 981 (1997), raised precisely the same claim that petitioners raise here. The only decision cited by petitioners that was decided since this Court denied certiorari in *Salvatore* is *United States* v. *Shotts*, 145 F.3d 1289 (11th Cir. 1998), cert. denied, 119 S. Ct. 1111 (1999), and that case is readily distinguishable for the reasons given in the text.

[4] Petitioners invoke the plain error standard of review in light of their failure to request a materiality instruction at trial. See Pet. 25 n.20; 99-939 Pet. 10 n.5.

claim, since petitioners sought to raise it for the first time in a supplemental brief filed eight days before the court issued its decision. It is well settled that a defendant waives appellate consideration of an issue raised for the first time in a reply or later supplemental brief. See, *e.g.*, *Dunham* v. *Kisak*, 192 F.3d 1104, 1110 (7th Cir. 1999); *United States* v. *Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 759 (6th Cir. 1999); *Orsini* v. *Wallace*, 913 F.2d 474, 476 n.2 (8th Cir. 1990), cert. denied, 498 U.S. 1128 (1991). Petitioners are not relieved from their waiver because *Neder* was decided after oral argument in the court of appeals. At the time the petitioners filed their initial brief on appeal, there was a clear-cut conflict in the circuits on whether the materiality of a charged falsehood is an element of mail or wire fraud. Compare, *e.g.*, *United States* v. *Slaughter*, 128 F.3d 623, 629 (8th Cir. 1997); *United States* v. *Cochran*, 109 F.3d 660, 667 n.3 (10th Cir. 1997) (materiality not an element), with *United States* v. *Rodriguez*, 140 F.3d 163, 167 (2d Cir. 1998); *United States* v. *DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998) (materiality is an element). Indeed, contrary to petitioner Cleveland's contention (Pet. 21), the issue was an open one in the Fifth Circuit. See *United States* v. *Moser*, 123 F.3d 813, 825-827 (5th Cir.), cert. denied, 522 U.S. 1035 (1997). In light of that waiver, petitioners have not properly preserved that issue for consideration by this Court.[5]

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[5] Petitioner Cleveland cites (Pet. 22) several cases in which this Court has granted the petition for certiorari, vacated the decision below, and remanded for further consideration in light of intervening authority. In each of those cases, however, the intervening authority had a crucial bearing on an issue timely raised on direct appeal and addressed by the appellate court.

In any event, petitioners' claim is without merit because the district court did give an adequate materiality instruction in connection with the mail fraud counts. The theory of the government's case was that, in documents filed with the State, petitioners concealed their ownership interests in TSG, Ltd., and other information to avoid the State's suitability assessment. The court instructed the jury that, in order to constitute a scheme to defraud, an omission must be "reasonably calculated to deceive persons of ordinary prudence and comprehension" and that it must "conceal[] a *material* fact." R. App. 4407 (emphasis added). The jury was thus instructed that it could find petitioners guilty of mail fraud based only on concealment of material information.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 99-939

IN THE
SUPREME COURT OF THE UNITED STATES

FRED H. GOODSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

In reply to the United States' Opposition to his Petition for Certiorari, Fred H. Goodson respectfully adopts and incorporates, as if fully set forth herein, the Reply in Opposition of co-petitioner Carl Cleveland, filed February 22, 2000 (#99-804). In addition, Mr. Goodson replies as follows to the government's erroneous contention that he waived his right to contend that the District Court erred in concluding that the video poker licenses were "property" under 18 U.S.C. § 1341.

In opposing Mr. Goodson's petition for certiorari, the government asserts that in his appeal to the United States Court of Appeals for the Fifth Circuit, Mr. Goodson did not "properly develop[ed] [the argument that the video poker licenses were not 'property' under 18 U.S.C. § 1341] under Federal Rule of Appellate Procedure 28(i) and had improperly attempted to adopt petitioner Cleveland's argument." *Government's Brief in Opposition* at 6 n.2.

Federal Rule of Appellate Procedure 28(i) provides, in pertinent part, that "[i]n a case involving more than one appellant . . . any party may adopt by reference a part of another's brief." That is precisely what Mr. Goodson did in his Fifth Circuit brief with regard to the "license as property" issue, when he stated that he "adopt[ed], to the extent applicable, the arguments raised by his co-appellants." *Brief for Appellant Fred H. Goodson* at 2. When the Fifth Circuit's opinion omitted Mr. Goodson from its statement that "Maria Goodson and Attorney Cleveland assert that a Louisiana video poker license is not 'property' for purposes of the mail fraud statute," Pet. App. 17a, Mr. Goodson promptly requested that that court correct its opinion to reflect his raising of the issue. Without comment, however, the Fifth Circuit "declined to amend the opinion."

The government here offers no authority for its contention – which was not adopted by the Fifth Circuit – that the language Mr. Goodson used to adopt his co-appellants' argument on this issue was insufficient to preserve this issue under Rule 28(i). In opposing Mr. Goodson's motion below, the government cited *United States v. Zannino*, 895 F.2d 1 (1st Cir. 1990), but that decision is inapposite. In that "La Cosa Nostra" racketeering case, involving "a number of racketeering, loansharking and gambling violations," the appellant had been granted a severance and tried separately from his co-indictees. *Id.* at 3.

In addition, the cases were separately briefed in the court of appeals. *Id.* n.1. Zannino's co-indictees "raised a series of issues which relate to their separate trial in ways not readily transferable to Zannino's circumstances." *Id.* at 17. By contrast, Fred Goodson and his co-appellants were indicted and tried together, on a single set of facts. The issue Mr. Goodson raised by reference applies to his case in exactly the same fashion that it applies to Mr. Cleveland and Maria Goodson.

Moreover, the Courts of Appeals are empowered to extend relief even to an appellant who, unlike Mr. Goodson, fails utterly to raise an issue on appeal, where to do otherwise would be unjust, and particularly where the issue is fully briefed by another party, and where there is no prejudice to the appellee. *See United States v. Allen*, 127 F.3d 260, 264 (2d Cir. 1997) (extending to appellant benefit of argument not raised by appellant where "the issue was raised in the briefs and the Government would not be prejudiced by our consideration of it"). The question whether a license may constitute "property" was extensively briefed by Mr. Goodson's co-appellants and the government fully availed itself of the opportunity to respond to that argument.

In *Government of Virgin Islands v. Brathwaite*, 782 F.2d 399 (3d Cir. 1986), the court found that the defendants' prosecution for drug offenses under both federal and Virgin Islands law was impermissible under *Blockburger v. United States*, 284 U.S. 299 (1932), and vacated their sentences. The court vacated the sentence of one defendant who had failed to argue this point, holding that:

> [T]o afford one coconspirator relief from multiple sentences without extending the same relief to another coconspirator who received identical sentences would be "at

> best unseemly and at worst a miscarriage of justice."

Id. at 408 (*quoting United States v. Bradsby*, 628 F.2d 901, 906 (5th Cir. 1980)). By arguing that Mr. Goodson has waived his right to raise this issue, the government seeks the same "unseemly" result here. Mr. Goodson and his co-appellant Carl Cleveland are serving identical 121-month sentences for their roles in the conspiracy alleged in this case. To deny Mr. Goodson any relief that his co-appellants might obtain on the ground that the licenses at issue here were not "property" would be patently unjust.

CONCLUSION

For the foregoing reasons, and for the reasons stated in his Petition for Certiorari, Mr. Goodson's Petition for Certiorari should be granted.

Respectfully submitted,

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